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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in concluding that analytical reports about the safety of nuclear power plants, distributed widely throughout the nuclear industry and submitted to the Nuclear Regulatory Commission by an industry consortium, may be withheld from the public under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential"?

PARTIES TO THE CASE

All parties to the case appear in the caption. The Business Roundtable, an association of chief executive officers of corporations, filed a brief as *amicus curiae* on rehearing *en banc* supporting respondents. Petitioner Critical Mass Energy Project is an unincorporated division of Public Citizen, Inc., a non-profit District of Columbia corporation.

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No. 92-

CRITICAL MASS ENERGY PROJECT,

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NUCLEAR REGULATORY COMMISSION and INSTITUTE OF NUCLEAR POWER OPERATIONS,

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PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The first opinion of the District Court, granting summary judgment for the Nuclear Regulatory Commission, is reported at 644 F. Supp. 344 (D.D.C. 1986) and appears in the appendix to this petition ("Pet. App.") at 36a-41a. The first opinion of the Court of Appeals, vacating and remanding for further proceedings, is reported at 830 F.2d 278 (D.C. Cir. 1987) and appears at Pet. App. 42a-64a. The opinion of the District Court on remand, granting summary judgment for respondents, is reported at 731 F. Supp. 554 (D.D.C. 1990) and appears at Pet. App. 66a-72a. The second opinion of the Court of Appeals, reversing and remanding, is reported at 931 F.2d 939 (D.C. Cir. 1991) and appears at Pet. App. 73a-90a. The order of the Court of Appeals vacating the panel opinion and granting rehearing *en banc* is reported at 942

F.2d 799 (D.C. Cir. 1991) and appears at Pet. App. 91a-92a. The opinion of the *en banc* Court of Appeals affirming the District Court, which is the subject of this petition, is reported at 975 F.2d 871 (D.C. Cir. 1992) and appears at Pet. App. 1a-33a.

JURISDICTION

The judgment of the Court of Appeals on rehearing *en banc* was entered on August 21, 1992. On October 7, 1992, the Chief Justice entered an order extending the time to file a petition for a writ of *certiorari* to and including December 19, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTE

Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), provides that the FOIA does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

STATEMENT OF THE CASE

1. *The FOIA Request.* This case arises out of petitioner's FOIA request for a series of reports about the safety of nuclear power plants submitted to respondent Nuclear Regulatory Commission ("NRC") by respondent Institute of Nuclear Power Operations ("INPO"). Petitioner is a non-profit research and advocacy group concerned with nuclear power issues. INPO is a non-profit organization created by the nuclear power industry after the 1979 incident at the Three Mile Island plant. All the utility companies that operate nuclear plants in this country are members of INPO. INPO does not generate nuclear power itself, nor does it have competitors. INPO's stated mission is to promote the safety and reliability of nuclear plants, which it does by analyzing operating

experiences at nuclear plants and disseminating information to its members.

After Three Mile Island, the NRC developed an "Action Plan" which required nuclear utilities to make sure that their personnel were made aware of new information about the safety of nuclear power on a regular basis. Because it would be prohibitively expensive for every nuclear plant to develop its own procedures for monitoring all safety information in the industry, INPO established a clearinghouse to perform that function, known as the Significant Event Evaluation and Information Network ("SEE-IN"). Under SEE-IN, INPO engineers analyze safety-related "events" at nuclear plants, using a broad range of sources, including technical literature, publicly available NRC records, and interviews with plant employees. INPO engineers then summarize their analyses and make recommendations for corrective actions in SEE-IN reports, which are the records at issue in this case.

INPO distributes the SEE-IN reports to all operators of nuclear power plants in this country, and also to engineering and construction firms, to an insurer for the industry, and to consultants and contractors. This wide distribution is central to the SEE-IN program, which is intended to inform employees in the nuclear industry of safety experiences at every nuclear plant, and thus to satisfy the requirements of the NRC's Three Mile Island Action Plan. In 1982, the NRC endorsed SEE-IN as a way for nuclear licensees to satisfy their obligations under the Action Plan.

The NRC also entered into an agreement with INPO, under which INPO agreed to provide the SEE-IN reports to the NRC, and the NRC agreed not to release the SEE-IN reports to the public. The NRC uses the SEE-IN reports to make sure that licensees are in fact making their employees aware of new safety information, as

required by the Action Plan. The NRC also uses the SEE-IN reports to check the completeness and accuracy of other, similar reports that nuclear licensees are required to submit to the NRC within thirty days of any safety-related event, known as Licensee Event Reports ("LERs"). LERs are supposed to give the NRC a full understanding of the underlying causes of safety events, and also to explain corrective actions planned by the licensee. *See generally* 10 C.F.R. § 50.73; 48 Fed. Reg. 33,850 (1983). The NRC routinely discloses LERs to the public.

In 1984, petitioner submitted a FOIA request to the NRC for the SEE-IN reports. The NRC withheld the reports under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The NRC did not argue that the reports contained trade secrets or privileged information, but maintained that they contained "commercial . . . confidential" information, even though the reports include no competitively sensitive sales or marketing data and are shared with everyone in the nuclear industry.

Under the test then governing Exemption 4, information could be withheld as "confidential" only upon a showing that "disclosure of the information is likely . . . to impair the Government's ability to obtain necessary information in the future; or . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The NRC did not argue that disclosure would cause competitive harm to either INPO or its members, but rather that the SEE-IN reports were exempt under the governmental "impairment" prong of the *National Parks* test. According to the NRC, INPO had

threatened to withhold the reports from the NRC in the future if the NRC released them, and even if the NRC could obtain the reports, the possibility of disclosure might impair the quality of those reports in the future.

2. *First District Court and Appellate Proceedings.* Petitioner filed suit against the NRC, and both parties moved for summary judgment. Petitioner argued that, even if INPO refused to provide the reports to the NRC in the future, that could not impair the NRC's ability to obtain the reports, because INPO would continue to provide the reports to its licensee members, and the NRC had ample power to obtain the reports directly from the licensees. The District Court acknowledged petitioner's argument but concluded that disclosure of the reports would impair the NRC's ability to obtain them in the future, because the reports were currently provided "voluntarily" to the NRC by INPO. Pet. App. 40a.[1]

The Court of Appeals vacated and remanded. Pet. App. 42a-64a. The Court rejected the District Court's conclusion that the voluntary character of the submission, by itself, could determine whether the reports were exempt from disclosure. According to the Court of Appeals, a rule of decision resting solely on the voluntary-involuntary distinction would be inconsistent with the requirement established in the case law of Exemption 4, including *National Parks*, that an agency must provide a "detailed justification" of the reason why disclosure would impair its

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[1] Petitioner also argued that the SEE-IN reports did not contain "commercial" information because INPO was a not-for-profit entity, and because the information bore no relation to sales, purchases, or exchanges of goods or services. The District Court rejected this argument, relying on Circuit precedent. Pet. App. 38a (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). The Court of Appeals affirmed this conclusion in the first panel opinion, Pet. App. 47a, and on rehearing *en banc*, Pet. App. 19a.

ability to obtain the information in the future. Pet. App. 52a. In particular, the Court observed that, under its prior decisions, the agency's ability to compel disclosure of information that it receives voluntarily may be sufficient to ensure that its access to the information would not be impaired in the future. Pet. App. 53a, n. 26. Indeed, as the Court noted, the NRC admitted that it would be able to obtain the reports by requiring their submission directly from the licensees. Pet. App. 52a.

However, the Court of Appeals found plausible the NRC's argument that, even if it could obtain the reports by compulsory means, the usefulness of the reports might decline, because nuclear plant employees, knowing the reports would be disclosed, might be less candid in their discussions with INPO analysts about the possible causes of events at their plants. Pet. App. 56a-57a. Because there was no evidence in the record that the quality of the SEE-IN reports would decline as a result of disclosure, the Court remanded for further proceedings on that issue. The Court also ruled that the NRC could prevail if it showed that disclosure would impair the efficiency of its operations, for example, if the process of compelling submission of the SEE-IN reports directly from the licensees would be too burdensome. Pet. App. 59a-61a.

Circuit Judge Buckley dissented from the remand, and would have ruled that the SEE-IN reports were exempt from disclosure solely because they were submitted to the NRC voluntarily. He concluded that Exemption 4 was intended to encourage cooperation by parties who are not to obliged to provide information to the Government, and that the "impairment" prong of the *National Parks* test should be deemed satisfied whenever disclosure would interfere with the agency's ability to obtain information on a voluntary basis. Pet. App. 62a-63a.

3. *Remand and Second Appeal.* On remand, INPO intervened as a defendant, and all parties moved for

summary judgment. The NRC and INPO argued principally that nuclear plant employees would no longer be forthright with INPO analysts if they knew that the SEE-IN reports would be disclosed to the public, and this lack of candor would impair the quality of those analysts' reports and their usefulness to the NRC. At oral argument, the District Court characterized the respondents' affidavits as conclusory on this point, and suggested that respondents should submit evidence that INPO analysts give express or implied promises of confidentiality to nuclear plant employees, or that employees rely on the limited disclosure of the reports.

Respondents never submitted this evidence. Nevertheless, the District Court again granted summary judgment, under the separate theory that the NRC's efficiency of operations would be impaired by disclosure. The District Court reasoned that disclosure might damage the friendly "symbiosis in the relationship between NRC and INPO" and would make the NRC and INPO "[i]f not outright antagonists, . . . at best . . . wary allies." Pet. App. 72a.

The Court of Appeals again reversed and remanded because of the lack of evidence supporting respondents' impairment argument. Pet. App. 73a-90a. The panel first rejected the District Court's reasoning that the disruption of the friendly relationship between the NRC and INPO warranted an exemption on the theory that acrimony would impair the NRC's efficiency of operations. The panel noted that, if that theory were correct, a submitter could essentially dictate whether information was confidential for purposes of the FOIA by threatening non-cooperation in the future, which would conflict with the accepted principle that " 'the test for confidentiality is an objective one.' " Pet. App. 83a (quoting *National Parks*, 498 F.2d at 766).

As for the argument that disclosure would inhibit nuclear plant employees from speaking candidly with INPO analysts, the panel found nothing in the record to support such a finding. In particular, the panel noted the complete absence of any evidence that INPO analysts give promises of confidentiality to plant employees. The panel also found no evidence that the SEE-IN reports could reveal the identity of any nuclear plant employees if the reports were released to the public, as the reports do not identify the sources of information on which they are based. Pet. App. 86a-87a & n. 8.

In a concurring opinion, Judge Randolph, joined by Judge Williams, agreed that the record could not support the District Court's grant of summary judgment under the "impairment" prong of the *National Parks* test, but expressed doubt that *National Parks* had been correctly decided. Pet. App. 89a-90a. Judge Randolph stated that, if the matter were one of first impression, he would reject the *National Parks* test and would conclude that information was "confidential," and therefore exempt from disclosure, as long as it was not "publicly disseminated," whether or not disclosure would cause any identifiable harm to the Government or to the submitter of the information. Judge Randolph observed, however, that the D.C. Circuit had endorsed *National Parks* many times, even in a prior decision in the same case, and that he was barred by both the law of the circuit and the law of the case from following either what he considered to be the plain language of the statute or Judge Buckley's dissent in the prior decision.

4. *Proceedings En Banc*. Respondents filed petitions for rehearing and suggestions for rehearing *en banc*, urging the Court of Appeals to overrule *National Parks* and to adopt a broader construction of Exemption 4. Respondents argued that information should be exempt from disclosure as "confidential" whenever it would not

"customarily" be disclosed to the public, whether or not disclosure would cause any identifiable harm to the Government or the submitter. Neither respondent suggested that the Court of Appeals should adopt the construction proposed in Judge Buckley's earlier dissent, *viz.*, that information is confidential if it is submitted voluntarily to the Government.

The Court of Appeals vacated the panel decision and granted rehearing *en banc* to reconsider *National Parks*.[2] Pet. App. 91a. In their *en banc* briefs, both respondents argued again that the Court should overrule *National Parks* and hold that information is always confidential if it is not customarily disclosed to the public by the submitter. Again, neither respondent argued in favor of the position taken in Judge Buckley's dissenting opinion on the first appeal.

On rehearing, a divided *en banc* Court, per Judge Buckley, affirmed the District Court. Pet. App. 1a-20a. The Court first rejected respondents' suggestion that *National Parks* be entirely overruled. Applying the principles of *stare decisis* outlined by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court concluded that respondents had failed to demonstrate any of the considerations that could justify overturning *National Parks*. Observing that seven other Circuits had adopted the *National Parks* test for Exemption 4 cases, the Court of Appeals concluded that "[f]ar from being overtaken by the tide of recent judicial developments, *National Parks*, it seems, has ridden its crest." Pet. App. 12a. The Court also noted that Congress had adopted the *National Parks* test when it enacted a similar business-records exemption to the

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[2] Then-Circuit Judge Thomas participated in the decision to grant rehearing *en banc* but was elevated to this Court before oral argument.

Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), which is closely related to the FOIA. Pet. App. 12a. The Court further rejected respondents' contention that *National Parks* had proven unworkable in application, and it dismissed cases cited by the respondents as merely illustrating difficulties that arise "wherever judicial lines are drawn." Pet. App. 13a.

Nevertheless, the Court dramatically "confined" the *National Parks* test by limiting its application to information that submitters are *required* to give to the Government. Pet. App. 2a, 13a-20a. For information that submitters supply "voluntarily" to the Government but do not "customarily" disclose to the public, the Court adopted a new categorical rule that all such information is "confidential," and therefore exempt from disclosure under Exemption 4, whether or not its disclosure would cause any demonstrable harm to either the Government or the submitter. Indeed, the Court observed that, in such cases, the courts should respect the private interest in withholding information from the public "for whatever reason." Pet. App. 16a.

The Court did not, however, provide any guidance as to when information should be deemed to have been provided "voluntarily" to the Government, except to conclude that the test for voluntariness was met in this case because submission of the SEE-IN reports had not been legally compelled, even though the NRC had the statutory authority to compel the licensees to submit the reports, should it wish to exercise that authority. The Court also rejected petitioner's argument that a categorical rule exempting voluntary submissions would encourage agency behavior in conflict with the FOIA's mandate for disclosure, by allowing agencies to agree to accept information on a "voluntary" basis on condition that it be withheld from the public, even when the agencies could,

and would, compel submission of the information without difficulty. Pet. App. 19a.

For information that is required to be submitted, the Court also reformulated the "impairment" prong of its prior test. Although the Court recognized that the Government's access to information cannot be impaired if production of the information is compelled, it speculated that, in some circumstances, disclosure could affect the reliability of the compelled data. Therefore, the Court ruled that, when dealing with a FOIA request for information that a submitter is required to provide, the impairment inquiry should focus on the possible effect of disclosure on the quality of the information. Pet. App. 15a-16a.

Judge Randolph, joined by Judges Silberman and Sentelle, filed a concurring opinion, in which they concluded that *National Parks* had been wrongly decided, but that respondents had not made the showing necessary to overrule it, given its near-universal adoption in the other Circuits. Pet. App. 23a. They also concluded that, although *National Parks* should not be overruled, it should not be applied to cases involving information submitted voluntarily to the Government. *See* Pet. App. 23a-24a.

Judge Ruth Ginsburg, joined by Chief Judge Mikva and Judges Wald and Edwards, filed a dissenting opinion. Pet. App. 25a-33a. The dissent observed that, by removing all voluntary submissions from the *National Parks* test, the majority had "substantially revise[d]" the law of the Circuit and "diminishe[d] as well sister circuit case law patterned on [the] *National Parks* decision." Pet. App. 25a. The dissent pointed out that no other court had concluded that voluntarily submitted information was governed by a different test than *National Parks*, and that the First Circuit and District Courts in the D.C. Circuit had applied *National Parks* to information furnished to the Government voluntarily. Pet. App. 28a-29a.

The dissent also criticized the majority opinion as unfaithful to both *National Parks* and the Congress' "unmistakably clear direction" in favor of disclosure in the FOIA. Pet. App. 30a. After reviewing the *National Parks* decision, the dissent pointed out that the *National Parks* panel had concluded that the "impairment" prong was not applicable to information required to be submitted to the Government, and therefore, that panel must have intended the "impairment" prong to have "its principal utility in cases of information voluntarily submitted." Pet. App. 28a. The dissent also argued that the majority's new test was not objective, because it provides for no judicial check on the reasonableness of the submitter's claim that the information was confidential, and bears no relation to the Congress' particular purpose in enacting Exemption 4, the protection of competitively sensitive information. Pet. App. 26a-27a. According to the dissent, the majority's rule encourages agencies to follow the path of least resistance and accede to submitters' requests for confidentiality, in sharp conflict with the FOIA's mandate for disclosure. Pet. App. 30a-31a.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Important Questions of Interpretation of the Freedom of Information Act That Should be Settled by This Court, It Conflicts With Other Appellate Decisions, and It Creates Serious Problems in the Adminstration of the Act.

This Court has never construed Exemption 4 of the FOIA, but with impressive unanimity, all the Circuits that have done so before this case have adopted the *National*

Parks test first enunciated by the D.C. Circuit in 1974.[3] Congress has also embraced *National Parks* by adopting that test for at least four other statutes that incorporate, or are worded similarly to, Exemption 4 of the FOIA: the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), *see* 122 Cong. Rec. 24,181 (1976), S. Conf. Rep. No. 1178, 94th Cong., 2d Sess. 15 (1976), H.R. Rep. No. 880, pt. I, 94th Cong., 2d Sess. 10 (1976); the Federal Advisory Committee Act, 5 U.S.C. App. § 10; the Federal Trade Commission Act, 15 U.S.C. § 46(f), *see* H.R. Conf. Rep. No. 917, 96th Cong., 2d Sess. 28 (1980), S. Rep. No. 500, 96th Cong., 1st Sess. 10-12 (1979); and the Consumer Product Safety Act, 15 U.S.C. § 2055(a)(2), *see* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 877 (1981). For eighteen years, *National Parks* has worked well in the agencies and the courts, and the Government has never sought *certiorari* to have it overruled.

The decision below destroys the uniformity of this settled construction of Exemption 4 and introduces an arbitrary and unworkable distinction between voluntary and mandatory submissions. This distinction was not

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[3] *See 9 to 5 Org. for Women Office Workers v. Bd. of Governors*, 721 F.2d 1, 8 (1st Cir. 1983); *Orion Research, Inc. v. EPA*, 615 F.2d 551, 553 (1st Cir.), *cert. denied*, 449 U.S. 833 (1980); *American Airlines v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1207 n.55 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 421 U.S. 1137 (1985); *Shermco Indus. v. Secretary of Air Force*, 613 F.2d 1314, 1317 (5th Cir. 1980); *Continental Oil Co. v. FPC*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *General Elec. Co. v. NRC*, 750 F.2d 1394, 1402-03 (7th Cir. 1984); *Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936, 946 (10th Cir. 1990).

advanced by any of the parties, has never been thought to be dispositive before, has never been mentioned in decisions of the other Courts of Appeals adopting or applying *National Parks*, and is contrary to the decision of the First Circuit in *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1983). Moreover, the Court of Appeals' rule is fundamentally inconsistent with the FOIA's overarching goal of disclosing important information about the operations of the Government, unless one of Congress' objective criteria for withholding records is satisfied.

1. *The Ill-Defined Nature of the Voluntary/Mandatory Disctinction.* A major defect in the Court of Appeals' decision is that it draws an arbitrary line between mandatory and voluntary submissions of information to the Government, while providing no guidance for distinguishing between the two. The Court incorrectly assumed that all submissions could be neatly divided into two categories. Its rigid formulation does not reflect the reality of the many means by which governmental agencies obtain information; in fact, it is often unclear whether information obtained by the Government from private parties is submitted under compulsion or voluntarily. The agency may believe that regulated entities are legally required to provide certain information, but those entities may disagree.

Thus, in one common scenario, an agency sends a subpoena *duces tecum* to a company, which threatens to contest the subpoena on the grounds that it is overbroad and beyond the agency's statutory authority, but ultimately agrees to provide the information, on condition that the agency withdraw the subpoena. *See, e.g., General Electric Co. v. NRC*, 750 F.2d 1394, 1396 (7th Cir. 1984) (NRC subpoena during licensing proceeding); *see also* 15 U.S.C. § 1401(b),(c) (Secretary of Transportation may require

inspection and production of documents, but only reasonably, and as relevant to certain purposes). Even the agency's regulations may reflect ambivalence on whether submission of information is mandatory. For example, EPA regulations implementing the Toxic Substances Control Act state that "EPA may, by letter, request a person to submit" certain information, but that "[i]f the requested submissions are not made, EPA may subpoena them." 40 C.F.R. § 716.40. Whether information obtained in any of these circumstances is submitted "voluntarily" is far from clear, and courts hearing FOIA cases seeking such information will now routinely have to decide that issue.

The Court of Appeals' mandatory/voluntary distinction fails to provide any guidance in many circumstances. For example, the Government requires information to be submitted with many different kinds of applications, *e.g.*, for approval to place new drugs on the market, for permission to transport toxic substances and pesticides, for federal grant funding, for loan guarantees, and for procurement contracts. *E.g.*, 7 U.S.C. § 136a(c) (pesticides); 15 U.S.C. § 2604 (toxic substances); 21 U.S.C. § 355 (new drugs). Since nothing compels any person to submit any of these applications, or to construct a nuclear power plant, or to make a public offering of securities, or to seek federal employment, all information submitted on such occasions is provided "voluntarily," in one sense, even if regulations require submission of information whenever these benefits are sought. *See also Washington Post Co. v. HHS*, 865 F.2d 320 (D.C. Cir. 1989) (financial interest forms required of consultants to federal government); *Teich v. FDA*, 751 F. Supp. 243, 246 (D.D.C. 1990) (animal studies submitted to FDA in support of application for approval of injectable silicone). Moreover, applicants often provide information beyond that strictly required to increase the chances of their applications being granted, and the Government often asks applicants to submit information

to make their applications more complete. *See, e.g.*, 21 C.F.R. §§ 314.60, 314.102 (discussing amendments and supplementations to new drug applications submitted to FDA); 7 U.S.C. § 136a(c)(2), 40 C.F.R. § 152.105 (EPA may ask for more information on pesticide registration applications). Whether such additional information is being provided voluntarily within the meaning of the D.C. Circuit's new test is also unclear.

The Court of Appeals' rule may create the greatest confusion in the area of government contracts, especially negotiated contracts. Under the Federal Acquisition Regulations System ("FARS"), agencies procuring materials through negotiated contracts may specify requirements for initial offers in their solicitations for proposals. But by the very nature of negotiated contracts, offerors are likely to supplement their initial proposals with further information, and the FARS recognizes that offerors should have the opportunity to submit revised technical and price information. *See* 48 C.F.R. 15.610. Yet the Court of Appeals' decision provides no method for determining which information obtained in the contracting process is submitted voluntarily and which is not, and, more significantly, there may never be a predictable or realistic basis for making such a determination.

In this area, the effect of the decision below can already be seen. In a "reverse-FOIA" lawsuit filed by a Government contractor to enjoin the Government from disclosing information, one court has ordered the Air Force not to release option price information in a procurement contract.[4] The Court concluded that the

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[4] "Reverse-FOIA" suits are actions brought by companies who submit information to the Government to prevent the disclosure of that information by the Government. Reverse-FOIA suits usually allege that disclosure of the information would be "not in accordance

(continued...)

price information was exempt from disclosure under the D.C. Circuit's new test because the contractor had submitted the bid to the Air Force of its own volition, and thus the price information in the accepted contract was submitted voluntarily by the bidder. Transcript of Motions Hearing at 35, *McDonnell Douglas Corp. v. Rice*, No. 92-2211-JHG (D.D.C.) (hearing held Sept. 30, 1992, transcript filed Oct. 1, 1992).

Furthermore, any information that the Government requires its contractors to provide even after formation of a contract, as a condition of contracting, might also be considered "voluntary," under the reasoning that contracting with the Government is voluntary, and private parties could avoid the obligation by declining to do business with the Government. The Government obtains extensive reports on matters of significant public interest from its contractors, all of which could be withdrawn from the public. *See, e.g.*, 41 C.F.R. § 60-1.7 (equal employment opportunity reports required from all federal contractors); *Miami Herald Pub. Co. v. Small Business Admin.*, 670 F.2d 610 (5th Cir. Unit B 1982) (reports on federally guaranteed loans); *Indian Law Resource Ctr. v. Department of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979) (Indian tribe's law firm's billing statements required for disbursement of funds to tribe); *Comstock Int'l (U.S.A.) v. Export-Import Bank of the United States*, 464 F. Supp. 804, 809 (D.D.C. 1979) (progress reports for subsidized construction contract).

For these reasons, courts following *National Parks* eschewed a formalistic line between voluntary and mandatory submissions and applied a straightforward

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[4](...continued)
with law," 5 U.S.C. § 706(2)(a), because disclosure would violate the Trade Secrets Act, 18 U.S.C. § 1905, and is not required under the FOIA. *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

"impairment" test to all information obtained by the Government that was not competitively sensitive. Thus, in *9 to 5*, *supra*, the First Circuit ordered a remand under *National Parks* to determine whether any specific governmental interest protected by Exemption 4, including the Government's access to necessary information, would be impaired by disclosure of regional salary information which private businesses shared with the Federal Reserve Bank of Boston, and with each other. Although the submission of that information was plainly voluntary (there was no suggestion that the Federal Reserve Bank had the power to compel it), the Court apparently did not regard that point significant enough to mention. Yet if the First Circuit had applied the new test announced by the D.C. Circuit in the decision below, a remand would have been unnecessary because the voluntary nature of the submission would have been sufficient to make the information exempt from disclosure.

Previously, courts in the D.C. Circuit agreed that, even if information was obtained "voluntarily," that information might not be exempt from the FOIA if the agency could compel its submission. *See* Pet. App. 53a, 85a; *Teich*, *supra*, at 251 (ordering disclosure, because it was "inconceivable" that FDA could not, and would not, compel submission of evidence showing that silicone gel implants should be removed from market); *Comstock*, *supra*, at 809 (pointing out that agencies can always make reporting requirements more specific). Applying the "impairment" prong of *National Parks*, those courts reasoned that the Government's ability to obtain information would not be impaired if the Government could compel submission of the information without undue difficulty. Pet. App. 53a n.26.

This is not to say that the voluntary character of the submission was deemed completely irrelevant. Under the *National Parks* test, it was well established that if the

Government had no ability to compel submission of necessary information, or if the process of compelling it would be overly burdensome, then the information would be exempt from disclosure. *See* Pet. App. 61a; *Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991); *Timken Co. v. United States Customs Service*, 531 F. Supp. 194, 198 (D.D.C. 1981). In addition, courts applying *National Parks* concluded that, even if disclosure would not completely preclude the Government from obtaining necessary information in the future, when disclosure would seriously diminish the quality or completeness of the information, that information could be exempt. *See* Pet. App. 53a-57a, 85a; *Washington Post Co. v. HHS*, 690 F.2d 252, 268-69 (D.C. Cir. 1982); *Indian Law Resource Center*, *supra*, at 148.

Under *National Parks*, therefore, the courts focused on whether disclosure would cause an identifiable harm to the Government's information-gathering abilities. This unitary but fact-sensitive inquiry under the "impairment" prong of *National Parks* has worked well in practice, yet the D.C. Circuit has chosen to replace it with a new test that will assuredly be a ground for frequent litigation by both requesters and submitters. This significant departure from prior case law, and the problems that the new test will create, warrant this Court's review.

2. *The Incentive for Agencies To Evade the FOIA by Accepting Information Voluntarily.* The decision below should also be reviewed because it will lead to results that are fundamentally inconsistent with this Court's often-repeated admonitions that "'[t]he mandate of the FOIA calls for broad disclosure of Government records,'" and that "FOIA exemptions are to be narrowly construed." *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted); *accord Department of Air Force v. Rose*, 425 U.S. 352, 360-62 (1976). Far from ensuring broad access to agency records, the Court of Appeals' new rule

encourages agencies to act in conflict with the objectives of the FOIA by enabling them to withhold important records about the regulation of public health and safety under a claim that the information was submitted "voluntarily." Agencies may be tempted to undermine the effectiveness of the FOIA by agreeing to accept information on a "voluntary" basis, even when they could, and would, compel disclosure of the same information if necessary. The decision below effectively permits agencies to contract for exemptions from the FOIA.[5]

The question is not whether agencies and submitters would "conspire" to keep information from the public, as the Court of Appeals suggested, Pet. App. 19a. No such nefarious purpose need be attributed to the agencies. Rather, a realistic understanding of human nature compels the recognition that no agency has any incentive to open its files to the public and subject itself to scrutiny and possible criticism or embarrassment. This common-sense insight was fundamental to Congress' decision to enact the FOIA. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Congress' overarching objective was to limit agency discretion to withhold records, not expand it, as the Court of Appeals has done. Thus, Congress substituted legislative judgment for administrative discretion by confining the agencies' authority to withhold records to

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[5] This danger is not speculative, but is borne out in the record and the history of the NRC. In 1980-81, the NRC considered instituting a greatly expanded mandatory reporting system that would have required licensees to file reports about component failures at their plants. *See* 46 Fed. Reg. 3541 (1981); 45 Fed. Reg. 6793 (1980). The NRC dropped plans for such a system when INPO volunteered to manage a similar system privately and assured the NRC that it would have access to the system. *See* 46 Fed. Reg. 49,134 (1981). Although the public would have been able to obtain any reports that the NRC required to be submitted, it cannot see the identical data on the INPO-operated system, because the information on the INPO system is submitted voluntarily.

narrow and clearly delineated statutory exemptions. *See Rose*, 425 U.S. at 360-61.[6]

The decision below also threatens to reduce the quality of information about Government regulation that remains available to the public, because it encourages regulated entities to provide Government agencies with only minimal data that will be made public, while submitting far more significant information in secret. This case, in fact, illustrates that very danger. As mentioned *supra*, p. 4, the NRC uses the SEE-IN reports to verify the completeness and accuracy of the descriptions of safety-related "events" at nuclear power plants in the publicly disclosed LERs, which licensees are required to submit to the NRC. But if licensees realize that they can tell the NRC the "real story" about events at their plants in the secret SEE-IN reports, their public LERs will inevitably become more and more sketchy, revealing less to the public about the important issue of safety at nuclear power plants. Under the Court of Appeals' new test, agencies' regulatory decisions will be based increasingly on secret information rather than public information, and citizens will have a diminished understanding of agency actions. Thus, the Court of Appeals' decision creates a mechanism by which agencies can insulate their decision-making from public monitoring and accountability.

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[6] To reinforce this point, Congress amended Exemption 3 in 1976 to overrule this Court's conclusion in *Administrator, FAA v. Robertson*, 422 U.S. 255, 266 (1975), that the FOIA did not supersede earlier statutes affording agencies "a broad degree of discretion on what information is to be [withheld]." Congress overruled *Robertson* because it was perceived as giving agencies "*cart[e] blanche* to withhold any information [they please]." H.R. Rep. No. 880, pt. I, 94th Cong., 2d Sess. 23 (1976). The thrust of the FOIA as a whole, including revised Exemption 3, "is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive Branch." *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 & n.34 (D.C. Cir. 1978).

In this regard, the importance of the decision below can hardly be overstated. Government agencies may have evidence that firms have distributed unsafe medical devices to the public, *see Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983); *Teich*, *supra*, participated in illegal boycotts, *see Green v. Department of Commerce*, 468 F. Supp. 691 (D.D.C. 1979), charged entertainment and lobbying expenses to the public under Government contracts, *see Common Cause v. Department of Air Force*, 1 GDS ¶ 80,162 (D.D.C. 1980), or engaged in price fixing, *cf. 9 to 5*, *supra*, at 13 (Breyer, J., dissenting). The Government's regulatory response to these matters is of the highest public interest, but without access to the factual basis for the Government's regulatory action or inaction, the public cannot reach an informed conclusion as to whether the Government has taken the proper course. Yet the decision below invites agencies to keep this material secret, by choosing to accept crucial information about public health and safety "voluntarily" and withhold it from the public. This *carte blanche* to the agencies, to close their files as they deem appropriate, is antithetical to the principles that led to the enactment of the FOIA and requires review by this Court.

3. *The Deviation From the Purpose of Exemption 4.* The decision below also warrants review because, in exempting safety-related data that is shared with an entire industry and has no bearing on any company's competitive position, it has adopted a construction entirely unrelated to the purpose of Exemption 4, *viz.*, the protection of competitively sensitive business information. At heart, Exemption 4 "protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *National Parks*, 498 F.2d at 768. There is no suggestion, in either the text or the legislative history of the exemption, that Congress intended the word "confidential" to include a situation in which an industry

consortium distributes safety data to all participants in the industry, some of whom may be in potential competition with each other.

Part of the problem with the decision below is its expansion of Circuit precedent which, in turn, construed the statutory term "commercial" too broadly. *See* Pet. App. 19a, 47a; *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1290. The Court of Appeals read the term "commercial" to include information that does not relate to the sale, purchase, or exchange of goods or services, or to the financial or marketing position of a company. In combination with its overbroad interpretation of the word "confidential," the Court of Appeals has expanded the scope of the exemption far beyond Congress' design for protection of business secrets, to include information circulating widely through an entire industry, even to competitors. This Court should adopt a construction of Exemption 4 more consonant with Congress' objective, either by construing the word "commercial" narrowly, or by limiting the exemption as a whole to competitively sensitive information.

4. *The Reverse-FOIA Problem.* Finally, the Court of Appeals' decision warrants review because it has opened up the possibility that the Government might be *prohibited* from disclosing information that is submitted voluntarily, even if the Government concludes that disclosure of the information promotes the public interest, and even if the information is not competitively sensitive. This possibility could deal a devastating blow to the public's ability to monitor agency operations.

Although it has long been settled that submitters of information can maintain "reverse-FOIA" actions to prevent the disclosure of competitively sensitive information, *see Chrysler Corp. v. Brown*, *supra*, under *National Parks* the prevailing view was that submitters could not successfully prevent the disclosure of information that was

not competitively sensitive by arguing that the Government's access to the information would be impaired as a result of disclosure. As Judge Posner pointed out, the Government is always likely to "lend[] a sympathetic ear to claims that disclosing a document will make it harder to get information in the future," *General Electric Co.*, *supra*, at 1402; thus, when an agency concludes that disclosure will not prevent it from obtaining necessary information in the future, its conclusion can not be challenged under the "impairment" prong of *National Parks*.

But in the decision below, the Court of Appeals explicitly recognized "a *private interest* in preserving the confidentiality of information that is provided the Government on a voluntary basis." Pet. App. 17a (emphasis added). This suggests that, in the future, a submitter that voluntarily provides information to the Government may successfully prevent disclosure of the information in a reverse-FOIA action, even if the information is not competitively sensitive. If so, then the Court of Appeals has effected a revolution in the law, for until now it has been the universal understanding that agencies have wide discretion to release information that is not competitively sensitive. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1155-56 (D.C. Cir. 1987); *National Org. for Women v. Social Security Admin.*, 736 F.2d 727, 745 (D.C. Cir. 1984); *General Electric Co.*, *supra*.

From at least one recent case, it appears that this is precisely the effect of the decision below. In *McDonnell Douglas Corp. v. Rice*, *supra*, a District Court enjoined the Air Force from disclosing the option price paid to a military contractor for equipment. Because the military contractors had entered into the contracting process voluntarily, the District Court reasoned that the option price was also submitted "voluntarily." Transcript of Motions Hearing at 35. Accordingly, the District Court concluded that the option price was exempt from

disclosure under the Court of Appeals' new construction of Exemption 4 and that the contractor could prevent disclosure of the price by the Government.

The District Court arrived at this conclusion notwithstanding the federal Government's long-standing practice, codified in regulations and heretofore ratified by the lower courts, of releasing the maximum possible information about Government contracts to the public, in recognition of the important public interest in monitoring Government contracting procedures. *See* 48 C.F.R. 5.401(b), 14.408-1, 205.303 (disclosure of contract information); *see also Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990); *Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1988) (unsuccessful reverse-FOIA suits). Indeed, the District Court in *McDonnell Douglas* observed that the probable effect of the Court of Appeals' new test is to render invalid many of the Government's regulations that encourage disclosure of information about Government contracting. Transcript of Motions Hearing at 38. This decision demonstrates the far-reaching and deleterious effects of the decision below on the public's ability to hold agencies accountable for their actions.

* * * *

For eighteen years, the *National Parks* test governed all commercial and financial information submitted to the Government by outside persons. Its universal adoption by other courts and its incorporation by Congress into other statutes demonstrate that the test has worked tolerably well. The Court of Appeals mistakenly believed that it was simplifying matters by confining the reach of *National Parks*, but in fact it has greatly complicated the law of the FOIA, and it has left agencies, requesters, and submitters with a test that is much more complicated and difficult to apply. Moreover, the Court of Appeals significantly

reduced the amount of vital information about public health and safety available to the public, and it may even have prohibited agencies from disclosing important information when they conclude that the public interest warrants such disclosure. Because of the significance of the decision below for the administration of the FOIA, and for public access to information generally, the writ of *certiorari* should be granted.

CONCLUSION

The writ of *certiorari* should be granted.

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December 18, 1992

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No. 92-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* January 29, 1992
Decided August 21, 1992

No. 90-5120

CRITICAL MASS ENERGY PROJECT, Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil No. 84-01943)

Paul R. Q. Wolfson, with whom *David C. Vladeck*, *Alan B. Morrison*, and *Eric R. Glitzenstein* were on the brief, for appellant.

Peter R. Maier, Attorney, U.S. Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, and *Leonard Schaitman*, Attorney, U.S. Department of Justice, and *John F. Cordes*, Solicitor, Nuclear Regulatory Commission, were on the brief, for federal appellee. *Carolyn F. Evans*, Attorney, Nuclear Regulatory Commission, also entered an appearance for federal appellee.

James D. Miller, with whom *Deborah J. Andrews* was on the brief, for appellee Institute of Nuclear Power Operations.

Janet L. McDavid was on the brief for *amicus curiae* The Business Roundtable, *urging affirmance*.

Before MIKVA, *Chief Judge*, and WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the court *en banc* filed by *Circuit Judge* BUCKLEY, in which *Circuit Judges* SILBERMAN, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH join.

Concurring opinion filed by *Circuit Judge* RANDOLPH, in which *Circuit Judges* SILBERMAN and SENTELLE join.

Dissenting opinion filed by *Circuit Judge* RUTH B. GINSBURG, in which *Chief Judge* MIKVA and *Circuit Judges* WALD and EDWARDS join.

BUCKLEY, Circuit Judge, with whom SILBERMAN, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*, join: Appellant seeks the release of certain reports that have been provided to the Nuclear Regulatory Commission by the Institute of Nuclear Power Operations on the understanding that they will be treated as confidential. In granting the petition to rehear the case *en banc*, we agreed to reconsider a seventeen-year-old decision, *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), in which we established a two-part test for determining when financial or commercial information in the Government's possession is to be treated as confidential under Exemption 4 of the Freedom of Information Act. We reaffirm the test but confine it to information that persons are required to provide the Government. We hold that where, as here, the information sought is given to the Government voluntarily, it will be treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public.

I. BACKGROUND

A. Legal Framework

When Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988), it "set[] forth a policy of broad disclosure of Government documents in order to ensure 'an informed citizenry, vital to the functioning of a democratic society.'" *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (citation omitted). At the same time, however, "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Id.* Balancing these private and public interests, Congress enacted nine exemptions to FOIA. Exemption 4, the provision at issue here, shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

In the years immediately following the enactment of FOIA, we had frequent occasion to put flesh on the exemption. *See, e.g.*, *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971); *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938-39 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). In *Sterling Drug*, we considered a FOIA request for records submitted to the Federal Trade Commission. In order to determine the purpose of Exemption 4, we examined the following passage from a Senate committee report:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

Sterling Drug, 450 F.2d at 709 (quoting S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964) ("Senate Report")). We

then concluded that the requested information was protected by the exemption because it was of "the type 'which would customarily not be released to the public by the person from whom it was obtained.' " *Id.*

Three years later, we decided *National Parks*. The plaintiff in that case sought disclosure of audits and other financial materials that the National Park Service required its concessioners to submit. We reversed the district court's grant of summary judgment in favor of the agency based on Exemption 4. After observing that the statute did not define "confidential," we noted that we had been guided, in earlier decisions, by the "would customarily not be released to the public" passage from the Senate Report. *National Parks*, 498 F.2d at 766. We found, however, that whether the person providing the information would customarily not have released it "is not the only relevant inquiry in determining whether that information is 'confidential.'. . . A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767. We then stated that "[i]n general, the various [FOIA] exemptions . . . serve two interests — that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy." *Id.*

We determined that Exemption 4 serves both of these purposes. As to the governmental interest, we noted that "[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the Government to make intelligent, well informed decisions will be impaired." *Id.* After discussing the legislative history, we concluded that "[t]his exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government[.]" *Id.* at 768 (quoting *Soucie*, 448 F.2d at 1078).

Turning to the private interests, we noted that the exemption "protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* We also recognized

> a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

Id. at 769. We concluded that the legislative history "firmly supports the inference that section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies which gather it." *Id.* at 770. We then offered what has come to be known as the *National Parks* "two-part test":

> [C]ommercial or financial matter is "confidential". . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted). At the same time, we reserved the question whether the impairment of other governmental interests might be implicated in the exemption. *See id.* at 770 n.17 ("We express no opinion as to whether other governmental interests are embodied in this exemption.").

On the facts of *National Parks*, we determined that, although the information being sought was customarily withheld from the public, "the Government ha[d] no apparent interest in preventing disclosure of the matter" as it was "supplied to the Park Service pursuant to statute." *Id.* at 770. We then held that

> [s]ince the concessioners are *required* to provide this financial information to the government, there is presumably no danger that public disclosure will *impair* the ability of the Government to obtain this information in the future[,]"

id. (emphasis in original), and remanded for further findings on the question of competitive harm. *See id.* at 770-71.

B. Facts and Proceedings Below

This case involves a dispute between Critical Mass Energy Project ("CMEP") and the Nuclear Regulatory Commission ("NRC") over access to safety reports prepared by the Institute for Nuclear Power Operations ("INPO") and voluntarily transmitted to the NRC on the condition that the agency will not release the information to other parties without INPO's consent. INPO was formed after the 1979 Three Mile Island accident to promote safety and reliability in the operation of nuclear power plants. INPO is a nonprofit corporation whose membership includes all operators of nuclear power plants in the United States.

One of INPO's principal programs is the Significant Event Evaluation and Information Network ("SEE-IN"), a system for collecting, analyzing, and distributing information concerning the construction and operation of nuclear facilities. Compilation of these reports requires the solicitation of candid comments and evaluations from nuclear power plant employees. The reports are distributed on a voluntary basis to INPO members, certain other participants in the nuclear industry, and the NRC pursuant to the explicit understanding that they are not to be disclosed to additional persons without INPO's consent.

In 1984, CMEP asked the NRC, pursuant to FOIA, to provide it with copies of the INPO reports. The NRC denied the request, finding that they contained con-

fidential commercial information and were therefore protected from disclosure by Exemption 4. CMEP then brought suit in district court challenging the NRC's determination.

District Judge Thomas Penfield Jackson granted the NRC's motion for summary judgment, concluding that the documents were both commercial and confidential and therefore exempt under section 552(b)(4) as interpreted by this court in *National Parks*. *See Critical Mass Energy Project v. NRC*, 644 F. Supp. 344, 346-47 (D.D.C. 1986). The judge acknowledged that while INPO itself was not subject to NRC regulation, its members were; therefore, the agency could compel them to produce the reports. Nevertheless, deeming it "preferable to have the INPO reports furnished to the NRC voluntarily, rather than delivered up under compulsion in circumstances less conducive to candor, accuracy, and timeliness," Judge Jackson held that "the NRC's ability to acquire the information imparted by the INPO reports will likely be impaired if it is not permitted to honor its commitment to INPO to keep them confidential." *Id.* at 347.

On appeal, a divided panel reversed and remanded for further proceedings. *Critical Mass Energy Project v. NRC*, 830 F.2d 278 (D.C. Cir. 1987) ("*Critical Mass I*"). We agreed that the information sought was commercial. With respect to the question of confidentiality, we held that the agency must meet two requirements: First, it must establish that the information sought "would customarily not be released to the public by the person from whom it was obtained" — a condition that the NRC had met in this case; and second, it must show that "disclosure [would] harm a specific interest that Congress sought to protect by enacting the exemption." *Id.* at 281 (citation omitted). We observed that *National Parks* had identified two of those interests: (1) the Government's need to have access to

commercial and financial data and (2) the provider's need to be protected from competitive harm. *Id.* at 281-82.

Applying the *National Parks* test, we agreed that the INPO reports were not "customarily released to the public," *id.* at 282, but found insufficient evidence that the Government's ability to secure the information would be impaired. *See id.* at 282-86. We concluded that to prove impairment, the NRC would have to show either that cessation of INPO's voluntary submission of the reports would deprive the NRC of the information they contained or that the employment of alternative means of obtaining the reports would create a significant risk that their value would be diminished. *Id.* at 283. We held that the NRC could not establish the first point, as the agency had ample authority to compel production of the INPO reports from its licensees, *id.* at 283-84, and remanded for further findings on the second. *Id.* at 286. We also held that the interests identified in *National Parks* (protection against governmental impairment and competitive injury) were not exclusive and instructed the district court to consider efficiency and effectiveness concerns in conducting its Exemption 4 analysis. *Id.* at 286-87.

After remand, INPO intervened in the litigation. Cross-motions for summary judgment were filed, and the district court granted the defendants' motion based on a determination that they had shown that release of the reports would harm the governmental interest in efficiency and cooperation with INPO. *See Critical Mass Energy Project v. NRC*, 731 F. Supp. 554, 557 (D.D.C. 1990).

On appeal, we rejected the district court's rationale but remanded for further findings on the effect of disclosure on the quality of the reports. *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 943-44, 947 (D.C. Cir. 1991) ("*Critical Mass II*"). In particular, we asked for "testimony from working-level employees regarding the

importance of confidential treatment of INPO reports to their willingness to speak to INPO analysts." *Id.* at 946.

Judge Randolph, joined by Judge Williams, wrote a separate concurring opinion. While recognizing that the court was bound by them, he questioned our decisions in *National Parks* and *Critical Mass I*. He was particularly critical of the two-part test announced in *National Parks* for having "added — or, as has been said, 'fabricated, out of whole cloth' — an additional requirement that must be met before confidential information is exempt from disclosure." *Id.* at 847 (quoting Note, *Trade Secrets and the Fifth Amendment*, 54 U. Chi. L. Rev. 334, 364 (1987)).

In response to petitions filed by the NRC and INPO, we vacated the opinion in *Critical Mass II* and ordered that the case be reheard *en banc*. *See Critical Mass Energy Project v. NRC*, 942 F.2d 799 (D.C. Cir. 1991). In granting the petitions, we undertook not only to reexamine the decisions in *Critical Mass I* and *II*, but also to "reconsider the definition of 'confidential' set forth in *National Parks* . . . for purposes of applying Freedom of Information Act Exemption 4." *Critical Mass Energy Project v. NRC*, No. 90-5120, Order (D.C. Cir. Oct. 4, 1991).

II. DISCUSSION

A. *National Parks* Reexamined

In challenging the definition of "confidential" presented in *National Parks*, the NRC and INPO ask us to set aside circuit precedent of almost twenty years' standing. In obedience to the principle of *stare decisis*, we reaffirm the definition but correct some misunderstandings as to its scope and application.

1. *Stare Decisis*

"[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494

(1987). The Supreme Court has held that "any departure from the doctrine . . . demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Furthermore, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction . . . [f]or here, unlike in the context of constitutional interpretation, . . . Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (citations omitted).

In *Patterson*, the Supreme Court articulated in some detail the circumstances in which it may find sufficient justification for overturning a statutory precedent:

> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision. . . .
>
> Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.

Id. at 173 (citations omitted).

Circuit courts of appeal, of course, play a different role in the federal system than the Supreme Court, and this is reflected in certain differences in the manner in which the principle of *stare decisis* is applied to circuit precedent. *See*

United States v. Aguon, 851 F.2d 1158, 1172-76 (9th Cir. 1988) (Reinhardt, J., concurring). Circuit courts do not establish the ultimate judicial precedent for the application of a federal statute; and because there are thirteen of them, they will at times interpret the same statute in different ways. Moreover, circuit precedent is generally established by the majority vote of just three circuit judges. Their decisions, nevertheless, bind the circuit "unless and until overturned by the court en banc or by Higher Authority." *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (Ginsburg, Ruth B., J., concurring).

Thus, in addition to considering the factors outlined in *Patterson*, a circuit court may reexamine its own established interpretation of a statute if it finds that other circuits have persuasively issued a contrary construction. An *en banc* court may also set aside its own precedent if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed. For example, in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*), we overturned a four-year-old precedent because we concluded that the rule established in that case was inconsistent with the intent of Congress and that the panel had misapplied a Supreme Court decision. *Id.* at 1524. *See also Groves v. Ring Screw Works, Ferndale Fastener Div.*, 111 S. Ct. 498, 501 n.8 (1990) (given intercircuit conflict and panel's doubt about correctness of circuit precedent, "it might have been appropriate for the panel to request a rehearing *en banc*"); *Aguon*, 851 F.2d at 1160-72 (*en banc*) (overruling circuit precedent in light of conflict with subsequent Second Circuit opinion).

Appellees NRC and INPO have failed to demonstrate any of the considerations that would justify our overturning the *National Parks* test. We note, first, the widespread acceptance of *National Parks* by other circuits. To date,

seven have adopted its test of confidentiality; none has rejected it. *See, e.g., 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Res. System*, 721 F.2d 1, 7-10 (1st Cir. 1983); *American Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Acumenics Research & Technology v. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) *General Elec. Co. v. NRC*, 750 F.2d 1394 1402-03 (7th Cir. 1984); *Pacific Architects and Engineers Inc. v. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936, 946 (10th Cir. 1990). Far from being overtaken by the tide of recent judicial developments, *National Parks*, it seems, has ridden its crest.

Nor have appellees pointed to any subsequent action in Congress that would tend to "remove[ ] or weaken[ ] the conceptual underpinnings" of *National Parks*. *Patterson*, 491 U.S. at 173. To the contrary, Congress has taken cognizance of the case in enacting subsequent legislation. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1153 n.146 (D.C. Cir. 1987) ("[W]hen both Houses of Congress provided an exemption [to the Government in the Sunshine Act] . . . they accepted the *National Parks* standard as appropriate."), *cert. denied*, 485 U.S. 977 (1988).

Finally, we find that *National Parks* has not proven so "unworkable" in practice as to constitute a "positive detriment to coherence and consistency in the law" or a "direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173. Nor has there been a showing that the test, as applied in *National Parks*, will frustrate Congress's purposes in enacting Exemption 4. Appellees argue, nevertheless, that the decision has proven unworkable in its everyday application by agencies and the courts. They suggest that the impracticability of the "governmental impairment" prong is evidenced by the history of this case. They claim similar

difficulties with the "competitive injury" prong. *See, e.g., Greenberg v. Food & Drug Admin.*, 803 F.2d 1213 (D.C. Cir. 1986) (reversing summary judgment for further proceedings on the economic effectiveness of other means of compiling private customer lists); *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (reversing summary judgment for further proceedings on question of discoverability of secret information sought by reverse engineering).

While these decisions illustrate the difficulties that can arise wherever judicial lines are drawn, they fall short of demonstrating that *National Parks* is so flawed that we would be justified in setting it aside. Moreover, we believe that the categorical rule we announce today will greatly simplify the application of Exemption 4 in a significant number of cases.

Having examined these and other arguments in favor of overturning *National Parks*, we conclude that none justifies the abandonment of so well established a precedent. Whatever our individual opinions as to the merits of its two-part test, we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that "[*s*]*tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

2. The *National Parks* test

The *National Parks* two-part test was presented as a summary of its discussion of Exemption 4. *See National Parks*, 498 F.2d at 770 ("To summarize . . . ."). The test must therefore be read in a manner consistent with the observations and conclusions that preceded it. We quote the most pertinent of these:

> [O]ur decisions concerning this exemption have been guided by the following passage from the Senate Report, particularly the italicized portion:
>
> > This exception is necessary to protect the confidentiality of information which is obtained by the Government . . ., *but which would customarily not be released to the public by the person from whom it was obtained.*

Id. at 766 (emphasis in original).

> The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. *Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.*

Id. at 767 (emphasis added).

> *Apart from encouraging cooperation with the Government by persons having information useful to officials*, [Exemption 4] serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.

Id. at 768 (emphasis added).

> [There is] a twofold justification for the exemption of commercial material: (1) *encouraging cooperation by those who are not obliged to provide information to the government* and (2) protecting the rights of those who must.

Id. at 769 (emphasis added).

In summarizing these various purposes and justifications, we formulated the now familiar two-part test that

defined as "confidential" any financial or commercial information whose disclosure would be likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770 (footnote omitted). In applying this test to the facts of *National Parks*, we held that because

> the concessioners [were] *required* to provide this financial information . . . , there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.

Id. (emphasis in original). Then, because the record was incomplete as to the competitive harm that might be suffered by the concessioners on the release of the information, we remanded for other findings on that question.

While we indicated that the governmental interest is unlikely to be implicated where the production of information is compelled, we have since pointed out that there are circumstances in which disclosure could affect the reliability of such data. *See Washington Post Co. v. HHS*, 690 F.2d 252, 268-69 (D.C. Cir. 1982) (possible effect of disclosure on accuracy of statements filed by consultants). Thus, when dealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible effect of disclosure on its quality.

When a FOIA request is made for information that is furnished on a voluntary basis, however, we have identified a different aspect of the governmental interest in securing confidential information. As is apparent from the language we have italicized in the passages quoted above, the purpose served by the exemption in such instances is that of "encouraging cooperation with the Government by persons having information useful to officials," *National*

Parks, 498 F.2d at 768. Moreover, we have taken note of the probable consequences of a breach of confidence by the Government:

> Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the government to make intelligent, well informed decisions will be impaired.

Id. at 767. Thus, when information is obtained under duress, the Government's interest is in ensuring its continued reliability; when that information is volunteered, the Government's interest is in ensuring its continued availability.

A distinction between voluntary and compelled information must also be made when applying the "competitive injury" prong. In the latter case, there is a presumption that the Government's interest is not threatened by disclosure because it secures the information by mandate; and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA's presumption of disclosure, that interest must be significant. Where, however, the information is provided to the Government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation. In those cases, the private interest served by Exemption 4 is the protection of information that, for whatever reason, "would customarily not be released to the public by the person from whom it was obtained" — to use the formulation adopted by this court in *Sterling Drug*, 450 F.2d at 709 (quoting Senate Report at 9). Because *Critical Mass I* failed to take these distinctions into account, its holding would frustrate Congress's purpose of "encouraging cooperation with the Government by persons having information useful to officials," *National Parks*, 498 F.2d at 768. *See Critical*

Mass I, 830 F.2d at 288 (Buckley, J., concurring in part and dissenting in part); *Critical Mass II*, 931 F.2d at 948 (Randolph, J., concurring).

It should be evident from this review that the two interests identified in the *National Parks* test are not exclusive. Although we overrule our decision in *Critical Mass I*, we note that the panel there adopted the First Circuit's conclusion that the exemption also protects a governmental interest in administrative efficiency and effectiveness. *See Critical Mass I*, 830 F.2d at 286 (citing *9 to 5 Org. for Women Office Workers*, 721 F.2d at 11). And today, of course, we recognize a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis. We offer no opinion as to whether any other governmental or private interest might also fall within the exemption's protection.

B. Application of Exemption 4 to Information Provided on a Voluntary Basis

The Supreme Court has encouraged the development of categorical rules whenever a particular set of facts will lead to a generally predictable application of FOIA. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). The Court emphasized that

> *establishing a discrete category of exempt information*, [will] implement[ ] the congressional intent to provide "workable" rules. . . . Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered.

Id. at 779 (quoting *FTC v. Grolier, Inc.*, 462 U.S. 19, 27-28 (1983) (emphasis in original)). We also take cognizance of the Court's "practical approach when . . . confronted with

an issue of interpretation of [FOIA]." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989).

The circumstances of this case lend themselves to categorical treatment. It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release. Accordingly, while we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

We make three observations about this test. First, it is objective. As is the case with any claim under FOIA, *see* 5 U.S.C. § 552(a)(4)(B) (1988), the agency invoking Exemption 4 must meet the burden of proving the provider's custom. Second, we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently had this test been applied. Finally, in defining the limits of the *National Parks* confidentiality test, we do not repudiate any part of our holding in that case. A respect for *stare decisis* does not require the most expansive application of principles enunciated in a prior decision. To the contrary,

> [i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with

> care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821). *See also United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring).

Applying this rule to the INPO reports, we agree with the district court's conclusion that the information they contain is commercial in nature; that the reports are provided to the NRC on a voluntary basis; and that INPO does not customarily release such information to the public. *See Critical Mass*, 644 F. Supp. at 346-47 and n.5; *see also Critical Mass I*, 830 F.2d at 280-81. On the basis of these findings, we hold that the INPO reports are confidential within the meaning of Exemption 4 and therefore protected from disclosure.

CMEP asserts that the test we announce today may lead government agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information that the agency has the power to compel. CMEP alleges that the NRC had in fact planned to impose greatly expanded mandatory reporting requirements on its licensees until INPO undertook to manage the voluntary reporting system they would have replaced and to provide the NRC with access to the information generated by it. *See* Brief for Appellant at 37-39.

We know of no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act. Nor do we see any reason to interfere with the NRC's exercise of its own discretion in determining how it can best secure the information it needs. So long as that information is provided voluntarily, and so long as it is of a kind that

INPO customarily withholds from the public, it must be treated as confidential.

III. CONCLUSION

Having found none of the special circumstances that would justify overturning a precedent of such long standing, we reaffirm the two-prong test in *National Parks*. As a practical matter, however, we confine it to the category of cases to which it was first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government. We also hold that Exemption 4 protects any financial or commercial information provided to the Government on a voluntary basis if it is of a kind that the provider would not customarily release to the public.

Accordingly, we vacate our decision in *Critical Mass I* and affirm the district court's grant of summary judgment in favor of the NRC. To the extent that any of our other precedents may be read as inconsistent with our decision today, they are to that degree overruled.

So ordered.

RANDOLPH, *Circuit Judge*, with whom SILBERMAN and SENTELLE, *Circuit judges*, join, *concurring*: While I continue to believe, for the reasons previously given, *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), that the test announced in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), incorrectly interpreted Exemption 4 of the Freedom of Information Act, 931 F.2d at 947-48, I am persuaded that *stare decisis* counsels against overruling National Parks.

The Supreme Court rarely overrules its decisions construing statutes. *Stare decisis* is considered "most compelling" in such cases (*Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 565 (1991)). If the Court's interpretation of a statute is perceived as inaccurate or undesirable, legislative modification is possible. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986), citing, *inter alia*, Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 540 (1948). Congress' enactment of 28 U.S.C. § 1367 in response to *Finley v. United States*, 490 U.S. 545 (1989), illustrates as much. Other examples, gathered by the diligent research of Professor Eskridge, are collected in his article *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991), which lists congressional "overrides" of 121 Supreme Court statutory interpretation decisions from 1967 to 1990. *Id.* at 338 (Table 1). This is not to suggest that Congress acts only in response to judicial mistakes; or that a later Congress might not actually prefer a court's misinterpretation; or that legislative revision is always politically feasible. It is just the possibility of a congressional override that the Supreme Court has deemed important. That possibility, and the consequent force this adds to *stare decisis*, pertain as well to the federal courts of appeals. Statutes overriding interpretations rendered by the inferior federal courts are not uncommon. Professor

Eskridge cites 220 lower federal court decisions during the same period that met this fate. *Id.*

The federal appellate courts, however, are obviously not in the same position as the Supreme Court. We do not have the last judicial word on the meaning of legislation. Our statutory interpretations are subject to correction, not only by Congress, but also by the Supreme Court. Before Supreme Court review or congressional action, disagreements among the courts of appeals may develop. There is evidence that the extent of unresolved conflicts is considerable. A. HELLMAN, UNRESOLVED CIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM, at v (Final Report, Phase I, Dec. 1991) (prepared pursuant to Congress' request in section 302 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089). This seems inevitable. We now have potentially more than 6,000 different panels from thirteen circuits handing down tens of thousands of decisions each year.* Yet, in theory at least, the federal

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* The numbers play out as follows:

CIRCUIT	NUMBER OF JUDGES	POSSIBLE PANELS
D.C. Cir.	12	220
1st Cir.	6	20
2d Cir.	13	286
3d Cir.	14	364
4th Cir.	15	455
5th Cir.	17	680
6th Cir.	16	560
7th Cir.	11	165
8th Cir.	11	165
9th Cir.	28	3,276
10th Cir.	12	220
11th Cir.	12	220
Fed. Cir.	12	220
TOTAL	179	6,851

The tally uses the number of judges currently authorized by Congress for each circuit. *See* 28 U.S.C. § 44.

courts constitute one judicial system; to use Hamilton's phrase, when it comes to applying federal law we are parts of "ONE WHOLE." THE FEDERALIST No. 82, at 556 (A. Hamilton) (J. Cooke ed. 1961). I therefore believe that when there is a conflict among the circuits over the construction of a statute, a federal appellate court — sitting *en banc* — should reexamine its position, rather than simply adhere to circuit precedent, right or wrong. *Cf.* D.C. Cir. R. 15(a)(c). This reason for relaxing the force of *stare decisis* does not, however, apply here. As Judge Buckley's opinion for the court points out, seven other circuits have adopted the *National Parks* test; none has rejected it. We also are not faced today with the question of how much weight an *en banc* court should give to a recent ruling, made by a single panel, not yet interpreted, and applied by several subsequent panels.

Yet there is considerable space, I think, between overruling a decision and pressing forward with it for all it is worth. The factors recited above, and in the opinion of the court, counsel against the former. But nothing in the doctrine of *stare decisis* requires a court to go further. The risks of doing so have been well-stated by Justice Scalia, and his description deserves full quotation:

> Once . . . the scope of a statute [is expanded] beyond a reasonable interpretation of the language, [later cases] . . . press[ ] the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute. Some distance down that

> path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic.

NLRB v. International Bd. of Elec. Workers, 481 U.S. 573, 597-98 (1987) (Scalia, J., concurring); *see also Critical Mass Energy Project v. NRC*, 830 F.2d 278, 287-88 (D.C. Cir. 1987) (Buckley, J., concurring in part and dissenting in part).

The court's opinion today halts our progression down the path, and ensures that future decisions about these issues will be guided primarily by reference to the Act, not to *National Parks*. For that reason, and out of respect for the doctrine of *stare decisis*, I join the opinion of the court.

RUTH B. GINSBURG, *Circuit Judge*, joined by MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*, dissenting from the court's opinion: Our prior dispositions in this case closely followed and "[d]id not expand upon *National Parks [and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)]." *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 948 (D.C. Cir. 1991) (Randolph, J., concurring). Recognizing, as does the full court, that *stare decisis* is wise policy, particularly in cases of this sort, and that appellees have not shown cause to dislodge that sound policy, *see* majority opinion (maj. op.) at 9-12, I would preserve our *National Parks* precedent.

The court, instead, removes from the governance of *National Parks* all cases in which commercial or financial information is given to the Government voluntarily. The cutback substantially revises the law of this circuit and diminishes as well sister circuit case law patterned on our *National Parks* decision. *Stare decisis*, though protractedly addressed, has not been appropriately observed in today's decision. Nor has the guiding purpose of the Freedom of Information Act (FOIA) — to shed light on an agency's performance of its statututory duties — been well served by the en banc disposition. I therefore dissent from the court's FOIA and precedent unsettling judgment and opinion.

I.

The court in *National Parks* sought to define "confidential" as that word is used in FOIA exemption 4, covering

> . . . commercial or financial information obtained from a person and . . . confidential . . . .

5 U.S.C. § 552(b)(4). The definition that *National Parks* opinion author Judge Tamm developed for the court was designed to control both information voluntarily submitted and information a person is obliged to supply to the

Government. At the outset of the opinion, Judge Tamm indicated that defining "confidential" for exemption 4 purposes was the court's first task, and he reaffirmed what circuit precedent already made clear: "the test for confidentiality is an objective one"; objectivity requires the court to press beyond the inquiry "[w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained." *National Parks*, 498 F.2d at 766, 767;[1] *see Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.) (instructing that FOIA's "statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny," and stressing district court's responsibility, in the first instance, to insure that exemption 4 "is strictly construed in light of the legislative intent"), *cert. denied*, 400 U.S. 824 (1970).

The court today asserts that its revision of the *National Parks* test "is objective." Maj. op. at 17. That is true to the extent that my colleague demand more than the stamp-mark "Confidential" to shield a document: the provider must have a confidentiality custom and the agency must prove that custom.[2] But the court's slackened test is not

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[1] Later in the *National Parks* opinion, Judge Tamm restated:

> The district court concluded that th[e] information [requested] was of the kind "that would not generally be made available for public perusal." . . . [W]e do not think that, by itself, . . . supports application of the financial information exemption. The district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

498 F.2d at 770 (footnote omitted).

[2] The court leaves unaddressed whether, as here, the custom must prevail in the industry or may be simply the provider's unique practice. *Cf.* H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 18 (1978) (rejecting as clearly inappropriate the withholding of "all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests for information").

"objective" in the sense vital to Judge Tamm's reasoning in *National Parks*. No longer is there to be an independent judicial check on the reasonableness of the provider's custom and the consonance of that custom with the purposes of exemption 4 and of the Act of which the exemption is part. To the extent that the court allows providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed "subjective" and substantially departs from *National Parks*.

Judge Tamm's opinion in *National Parks* recounts the relevant legislative history first to explain why Congress provided an exemption for "commercial" material, and next to describe what it takes to warrant classification of "commercial" material as "confidential." 498 F.2d at 669-70. Regarding the former, Congress recognized "a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must." *Id.* at 769. Concerning the key word "confidential," *National Parks* summarizes:

> [C]ommercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted). The court left open the possibility that "other governmental interests" might also be protected by the exemption. *See id.* at 770 n. 17 (mentioning "problems of compliance and program effectiveness"); *see also* maj. op. at 15-16.

Not until he had thus summarized alternative tests for determining when commercial matter is "confidential," without distinguishing between voluntary and required submissions, did Judge Tamm turn to the application of his formula to the information at issue in *National Parks*: financial records (including audits and annual financial statements) of companies operating concessions in national parks. Judge Tamm then stated: "Since the concessioners are *required* to provide th[e] financial information to the [Park Service], there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future." 498 F.2d at 770 (emphasis in original).[3] This statement strongly suggests that the "impairment" test, given equal billing by the *National Parks* court, was comprehended by that court as having its principal utility in cases of information voluntarily submitted.

National Parks has by now figured as the leading decision in many cases in which information was furnished to the Government *voluntarily*. *See, e.g., 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983) (remanding for district court determination whether exemption 4 shields information); *Wiley Rein & Fielding v. U.S. Dep't of Commerce* 782 F. Supp. 675 (D.D.C. 1992) (holding documents unprotected by exemption 4); *Durnan v. U.S. Dep't of Commerce*, 777 F. Supp. 965 (D.D.C. 1991)

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[3] We have recognized and described, more recently, a qualitative aspect to the impairment test formulated in *National Parks*. Even when the Government requires submission of information, it may justify nondisclosure under exemption 4 by showing that the quality or reliability of the material provided would be so diminished by the prospect of public disclosure as to "seriously impair" the Government's information-gathering ability. *See* Washington Post Co. v. HHS, 865 F.2d 320, 325-28 (D.C. Cir. 1989); maj. op. at 14-15.

(holding information exempt); *Klayman & Gurley v. U.S. Dep't of Commerce*, 1990 U.S. Dist. LEXIS 4329 (D.D.C. Apr. 17, 1990) (holding information exempt); *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990) (holding information nonexempt); *ISC Group, Inc. v. U.S. Dep't of Defense*, 1989 U.S. Dist. LEXIS 5763, 35 Cont. Cas. Fed. (CCH) ¶ 75,667 (D.D.C. May 22, 1989) (holding information exempt). In no decision prior to today's ruling has any court suggested that the *National Parks* definition of "confidential" is good for required submissions only.[4] In short, the court's asserted "obedience" to *stare decisis*, *see* maj. op. at 9, is a "sometimes thing."

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[4] The court gives less than the full picture when it asserts that "we know of no case considered *by this court* in the past, other than *Critical Mass I* and *II*, that would have been decided differently had [the new] test been applied." Maj. op. at 17 (emphasis added). *But cf.* 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1 (1st Ct. 1983). The fact is, we have had rather few cases concerning voluntarily submitted information. In light of today's decision, however, more cases may be headed our way. *See, e.g.*, Teich v. Food and Drug Administration, 751 F. Supp. 243 (D.D.C. 1990). In *Teich*, the FDA maintained that voluntarily submitted animal test results and consumer complaint surveys concerning silicone breast implants were protected from FOIA disclosure by exemption 4. Applying *National Parks*, the district court first rejected the FDA's contention that disclosure would impair the government's ability to gather information:

> It may be true that the disclosure of documents submitted voluntarily will impair voluntary cooperation. However, where compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced.

Id. at 251. The *Teich* court next rejected the FDA's argument that release of the studies would cause the provider competitive injury. *Id.* at 253. The documents sought in *Teich* reflected unfavorably upon the submitter's product — just the sort of information a company would not customarily disclose. The *National Parks* test, as framed by Judge Tamm, may have discouraged an appeal in *Teich*; today's decision invites insistent appeal under exemption 4 in similar cases.

II.

The surgery done on *National Parks* might have been less questionable had that decision fundamentally misunderstood the legislative will or generated disagreement among the circuits. But the court forthrightly acknowledges that no such flaw marred *National Parks*. *See* maj. op. at 11-12. Thus the court's new exemption 4 test, devised for voluntary submissions, is all the more difficult to reconcile with Congress' unmistakably clear direction: "The mandate of the FOIA calls for broad disclosure of Government records," *CIA v. Sims*, 471 U.S. 159, 166 (1985) (footnote omitted), and "for this reason . . . FOIA exemptions are to be narrowly construed." *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act") (footnote omitted), *cert. denied*, 415 U.S. 977 (1974); *see also Washington Post Co. v. HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989) ("Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute.").

Under the test announced today, "financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Maj. op. at 17. No longer is it necessary to show in each case "how disclosure will significantly harm some relevant private or governmental interest." *See 9 to 5 Organization for Women Office Workers*, 721 F.2d at 12 (Breyer, J., dissenting). Henceforth, in this circuit, it will do for an agency official to agree with the submitter's ascription of confidential status to the information. There will be no objective check on, no judicial review alert to, "the temptation of government and business officials to

follow the path of least resistance and say 'confidential' whenever they seek to satisfy the government's vast information needs." *Id.*[5] Under the regime replacing *National Parks*, "the exemption [will] expand beyond what Congress intended." *Id.*

But the court sees virtue in a categorical rule, *see* maj. op. at 16, and such rules do have a place in FOIA's domain. "Categorical balancing" won favor, for example, in *U.S. Dep't. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989). The Court there held criminal rap sheets categorically exempt from disclosure under exemption 7(C) because the "basic policy" of FOIA, which focuses on the citizens' right to be informed about 'what their government is up to' . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773. Similarly, the Court ruled in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), that witness statements in pending unfair labor practice proceedings are categorically exempt from pre-hearing disclosure under exemption 7(A) because the "basic purpose of FOIA . . . to ensure an informed citizenry" would not "be defeated by deferring disclosure until after the Government ha[d] 'presented its case in court.' " *Id.* at 242 (footnotes and citations omitted).

A categorical approach, however, is not in order across the board under FOIA, without regard to the character of the information requested. Such an automatic approach is not suitable for judging the wide range of cases presenting

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[5] The Nuclear Regulatory Commission has conceded that it has "ample statutory authority . . . . to compel the production" of the information sought here. Critical Mass Energy Project v. NRC, 830 F.2d 278, 284-85 (D.C. Cir. 1987).

contests under exemption 4. That was Judge Tamm's essential point in *National Parks*. This case is illustrative.

Critical Mass Energy Project seeks access to comprehensive reports, prepared by a consortium comprised of the entire nuclear utility industry, concerning the causes and potential hazards of "significant" safety-related events at nuclear power plants. *See Critical Mass Energy Project v. NRC*, 830 F.2d 278, 279-80 (D.C. Cir. 1987). Disclosure of these reports, and the response of the Nuclear Regulatory Commission (NRC) to the information contained in them, would undoubtedly shed light on the character and adequacy of the Commission's pursuit of its mission to "encourage . . . the development and utilization of [nuclear] energy for peaceful purposes to the maximum extent consistent . . . with the health and safety of the public." 42 U.S.C. § 2013(d). The FOIA request we face seeks no "information about private citizens that happens to be in the warehouse of the Government"; disclosure is sought "not primarily in the commercial interest of the requester," but to advance public understanding of the nature and quality of the NRC's oversight operations or activities. *See Reporters Committee for Freedom of the Press*, 489 U.S. at 774, 775 (emphasis in original) (internal quotation omitted). "[T]he public interest that the FOIA was enacted to serve," *see id.* at 775, is thus centrally at stake.

FOIA creates "a judicially enforceable public right to secure . . . information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1965). Congress understood that it is no

> easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all

> interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *EPA v. Mink*, 410 U.S. at 80 n.6). The *National Parks* formulation fits the congressional design better than the virtual abandonment of federal court scrutiny approved by the court today for Government withholding of commercial or financial materials submitted voluntarily. For that reason, I dissent from the court's decision to overrule, in significant measure, our *National Parks* precedent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5120

September Term, 1991

CRITICAL MASS ENERGY PROJECT, Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

D. C. Civil No. 84-01943

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court en banc, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
CLERK

Date: August 21, 1992

Opinion for the Court filed by Circuit Judge Buckley.

Concurring opinion filed by Circuit Judge Randolph, in which Circuit Judges Silberman and Sentelle join.

Dissenting opinion filed by Circuit Judge Ruth B. Ginsburg, in which Chief Judge Mikva and Circuit Judges Wald and Edwards join.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRITICAL MASS ENERGY PROJECT, Plaintiff,

v.

NUCLEAR REGULATORY COMMISSION, Defendant.

D. C. Civil Action No. 84-1943

Sep. 26, 1986.

MEMORANDUM AND ORDER

This Freedom of Information Act ("FOIA")[1] case is before the Court on the parties' cross-motions for summary judgment. The material facts are undisputed, and the single issue of law before the Court is whether certain reports now given to the defendant agency by a non-party upon the former's promise not to divulge them are exempt from disclosure under FOIA as confidential commercial information. For the reasons set forth below, the Court concludes that the reports are exempt and will deny plaintiff's and grant defendant's motions for summary judgment, and dismiss the amended complaint with prejudice.

I.

Plaintiff Critical Mass Energy Project ("CMEP"), a non-profit consumer organization, seeks copies of various reports supplied by the Institute of Nuclear Power Operations ("INPO") to the Nuclear Regulatory Commission

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[1] 5 U.S.C. § 552 (1982).

("NRC"), the federal agency that regulates and licenses the construction and operation of commercial nuclear power plants in the United States.[2] INPO, also a non-profit corporation, is a consultative association established by the nuclear electric utility industry in 1979 in the wake of the Three Mile Island accident, and has as its members all 55 utility companies now producing domestic nuclear power. As one of its services to its members, INPO conducts "peer reviews" of their operations, and prepares reports of its analyses and recommendations with respect thereto. Some of the reports concern "events" with safety implications.[3]

Pursuant to a Memorandum of Agreement it reached with the NRC in April of 1982, INPO now routinely, and voluntarily, furnishes copies of its reports to the NRC, on condition, however, that the NRC not release them to others without INPO's consent. In January, 1984, CMEP made its FOIA request of NRC for copies of the INPO reports, which the NRC denied, INPO not consenting, on the ground that they were exempt from disclosure as confidential commercial information. This action for injunctive relief followed.

II.

Congress has exempted from disclosure under FOIA a category of information known as "trade secrets and commercial or financial information obtained from a per-

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[2] CMEP's amended complaint also included a count seeking access to the advisory process between INPO and the NRC under the Federal Advisory Committee Act, 5 U.S.C. app. I (1982). The parties reached a settlement resulting in the dismissal of that count.

[3] Much of the factual "event" information contained in the reports is already available to the public; the NRC independently requires its licensees to report similar information to it directly, and the information derived from licensees is concededly disclosable under FOIA.

son and privileged or confidential." 5 U.S.C. § 552(b)(4) (1982).[4] The NRC does not contend that the INPO reports are trade secrets or financial information or that they are privileged, but, rather, that they are "commercial information" and are "confidential" within the meaning of the exemption.

The Court of Appeals for the District of Columbia Circuit has held that the word "commercial" is to be given its ordinary meaning when read in conjunction with FOIA. *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Thus, information is commercial if it relates to commerce, *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978), or it has been compiled in pursuit of profit. *See Public Citizen*, 704 F.2d at 1290. CMEP argues that the INPO reports cannot be commercial, because INPO itself is a not-for-profit entity. The argument, however, is too categorical. While a factor to be considered, INPO's non-profit status is not by itself determinative. *See American Airlines*, 588 F.2d at 870. And INPO's constituent utility companies are assuredly commercial enterprises engaged in the production and sale of electrical power for profit. The revelation of the details of the operations of their nuclear power plants, whether in critical or laudatory contexts, could materially affect their profitability in multiple ways. The Court concludes that the INPO reports must be deemed to be "commercial" information in all relevant senses of the word.

For the reports to be exempt from disclosure, however, they must not only contain "commercial" information but be "confidential" as well. Information is said to be

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[4] It is undisputed that the INPO reports are "obtained from a person," private associations and corporations having been defined as "persons" under FOIA. 5 U.S.C. § 551(2); *Gulf and Western Industries v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979).

"confidential" if it is customarily not released to the public by the person from whom the government obtains it, *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 404 (D.C. Cir 1980), and if nondisclosure is justified by the legislative purpose underlying the exemption. *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) ("*National Parks I*").[5] That legislative purpose is to permit an agency to withhold information acquired from non-governmental sources which is necessary to its mission if its disclosure is likely either to impair the government's ability to obtain such information in the future or to cause substantial harm to the competitive position of its source. *National Parks I*, 498 F.2d at 770. The test is an objective one, however; the government's promise of confidentiality alone is not dispositive. *Washington Post Co. v. Department of Health and Human Services*, 690 F.2d 252, 268 (D.C. Cir. 1982).

NRC does not maintain that release of the reports will compromise anyone's competitive position, and CMEP does not doubt that the NRC finds the INPO reports necessary to its functions in the sense of being useful.[6] CMEP disputes, however the assertion that divulging them pursuant to FOIA would impair NRC's ability to get them

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[5] Although INPO does not make its reports generally available to the public, CMEP notes that the reports are sent to the utility companies themselves, and occasionally to industry consultants, contractors, and certain vendors; in short, to nearly everyone who may be interested except the public-at-large. The affidavit of the Director of the Communications Division of INPO states, however, that the instances in which reports are made available to non-members of INPO are the exceptions rather than the rule.

[6] The Court of Appeals has held that "necessary" information must be sufficiently important to the carrying out of the government's functions. *See Washington Post Co. v. Department of Health and Human Services*, 690 F.2d 252 (D.C. Cir. 1982).

(or their substance) in the future. The NRC already receives the same data its members send to INPO directly from the utilities themselves, the utilities being required to provide it as a condition of being licensed, and the INPO reports merely interpret and analyze that data, a task that CMEP says NRC could do for itself. Moreover, it says, NRC could simply subpoena the INPO reports, or adopt regulations requiring their submission by INPO's licensee-members if INPO resists.

But INPO itself is not a licensee. It is a voluntary membership organization of licensees, formed for the purposes of exchanging knowledge and experience with one another, and of rendering consensus judgments upon matters relating to the safe and efficient operation of nuclear power plants generally. INPO is not regulated by the NRC, and is under no legal obligation to report anything to the NRC, or even to prepare reports at all. It is fully autonomous, and could abandon its peer review process altogether, or disband entirely as easily as it came into existence.

It is clearly important for the NRC's purposes that INPO continue to be a forum for industry introspection and that it continue to make reports of the results of that process. It is also important that the NRC continue to receive the reports. Even assuming that the NRC is, in fact, capable of generating the substance of the reports on its own, and leaving aside all considerations of the time required for and cost to it to do so, it is nevertheless of considerable value to the NRC to be privy to the industry's own contemporaneous collective insights on problems of common — indeed, universal — concern, which is what it now obtains from INPO by way of its reports. And it is preferable to have the INPO reports furnished to the NRC voluntarily, rather than delivered up under compulsion in circumstances less conducive to candor, accuracy, and timeliness. The Court finds that the NRC's ability to

acquire the information imparted by the INPO reports will likely be impaired if it is not permitted to honor its commitment to INPO to keep them confidential, and concludes that they are exempt from disclosure under FOIA.

For the foregoing reasons, therefore, it is, this 26th day of September, 1986,

ORDERED, that plaintiff's motion for summary judgment is denied; and it is

FURTHER ORDERED, that defendant's motion for summary judgment is granted, and the amended complaint is dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5647

CRITICAL MASS ENERGY PROJECT, Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 84-1943)

Argued May 8, 1987

Decided Sept. 29, 1987

Eric R. Glitzenstein, with whom *David C. Vladeck* and *Alan B. Morrison* were on the brief, for appellant.

Peter R. Maier, Attorney, U.S. Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *Leonard Schaitman*, Attorney, U.S. Department of Justice, were on the brief, for appellee.

Before RUTH BADER GINSBURG, BUCKLEY, and D. H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RUTH B. GINSBURG.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* BUCKLEY.

GINSBURG, RUTH B., *Circuit Judge*: In this Freedom of Information Act (FOIA) case, plaintiff Critical Mass Energy Project (CMEP) seeks access to reports prepared by a utility industry consortium and voluntarily transmitted to the Nuclear Regulatory Commission (NRC or Commission). The district court granted the NRC's motion for summary judgment, holding that the reports in question could be withheld pursuant to 5 U.S.C. § 552(b)(4), FOIA's exemption for confidential, commercial information.[1] Because the NRC has not established on the current record that exemption (b)(4) shelters the disputed reports, we vacate the judgment in the NRC's favor and remand the case for further proceedings.

I.

The Institute for Nuclear Power Operations (INPO) was formed in the aftermath of the Three Mile Island accident to promote, in the NRC's words, "improved safety and reliability in the operation of commercial nuclear power plants through a program of self-regulation by peer review."[2] All 55 utility companies that operate or construct nuclear power plants in the United States are members of INPO, and finance its operations by their membership assessments.[3]

As part of its "SEE-IN" (Significant Event Evaluation and Information Network) Program, INPO periodically produces three types of reports: Significant Event Reports (SERs), Significant Operating Experience Reports (SOERs), and Operation & Maintenance Reminders (O & MRs). SERs are produced whenever INPO deter-

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[1] Memorandum and Order, C.A. No. 84-1943 (D.D.C. Sept. 26, 1986), *reprinted in* Joint Appendix (J.A.) at 284-90.

[2] Brief for the Appellee at 4-5.

[3] *Id.* at 5 & n. 2.

mines, on the basis of information provided to it primarily by its member utilities,[4] that a "significant"[5] safety-related event has occurred at a nuclear power plant. The SER describes the event and its "possible causes and effects" in detail, and sets out "INPO's candid and critical analysis of the problems identified."[6] SOERs contain more detailed follow-up analyses of these significant events, with more wide-ranging, generic recommendations concerning plant construction, design, and operation.[7] O & MRs concern operating problems deemed not significant enough to warrant the searching analysis included as part of the SERs and SOERs; O & MRs "generally describe operating or maintenance difficulties encountered in specific nuclear plants and discuss the means used to solve the problems."[8]

These reports, the focus of CMEP's FOIA request, are provided by INPO, at its expense, to the NRC under a 1982 Memorandum of Agreement. All INPO members and "participants,"[9] as well as the Nuclear Safety Analysis

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[4] *See infra* pp. 13-14 for a more detailed account of INPO's information sources.

[5] Determination that an event is "significant" is based upon INPO-developed screening criteria. *See* Defendant's Answers to Plaintiff's Interrogatories ¶ 4(A), J.A. at 20.

[6] Brief for the Appellee at 7.

[7] *Id.* at 7-8.

[8] *Id.* at 8 n. 6.

[9] "[INPO] presently has 13 international participants and 13 supplier participants. The international participants consist of utility organizations that operate or are constructing nuclear power plants in other countries. The supplier participants consist of nuclear steam supply system vendors and major architect[,] engineering or construc-

(continued...)

Center and the Nuclear Electric Insurance Limited,[10] receive copies of the reports. Outside consultants and contractors may receive copies "where necessary in order to make appropriate use of the report, *e.g.*, to take corrective action."[11] Copies are also sent to vendors whose products are discussed in the reports. Apart from these routine distributions, the reports may be disclosed to third parties only upon INPO's specific consent.[12]

The NRC resisted CMEP's request for access to these documents, claiming that they are covered by exemption 4 as "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §

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[9](...continued)
tion firms currently involved in nuclear work." INPO Policy Note No. 11, "Classification and Distribution of INPO Publications" (Aug. 22, 1984), J.A. at 195.

[10] According to material filed by the NRC with this court shortly after oral argument in this case, the Nuclear Safety Analysis Center is an arm of the Electric Power Research Institute (EPRI), a membership organization composed of domestic utilities engaged in the commercial production of electricity. There is only partial overlap between INPO and EPRI membership, *i.e.*, some INPO members are not members of EPRI and *vice versa*. The Nuclear Electric Insurance Limited (NEIL) provides its member utilities with replacement power insurance and property insurance; all NEIL members are also members of INPO.

[11] Brief for the Appellee at 9 n. 7.

[12] INPO classifies these reports in its "Limited Distribution" category, and displays the following statement prominently on the title page:

> Reproduction of not more than ten copies by each recipient for its internal use or use by its contractors in the normal course of business is permitted. This report should not be otherwise transferred or delivered to any third person, and its contents should not be made public, without the prior agreement of INPO.

Policy Note No. 11, *supra* note 9, J.A. at 198.

552(b)(4). The district court agreed, and granted the NRC's motion for summary judgment.[13] We vacate the judgment so ordered, concluding that the NRC, on the record thus far made, has not established that the documents sought are sheltered by the exemption claimed.

II.

To sustain its burden of demonstrating that these documents are within FOIA exemption 4,[14] the NRC must show that the information contained therein is "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F. 2d 392, 403 (D.C. Cir. 1980), quoting *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971). CMEP concedes that these reports were "obtained from a person,"[15] and the NRC admits that the information contained in the reports is neither "financial" nor "privileged"; therefore, we must decide, first, whether the information in the INPO reports is "commercial," and, if so, whether it is "confidential." We hold that the information is "commercial," but that the record, in its current state, does not permit a dispositive answer to the ultimate question: Is the information "confidential"?

A. *The INPO Reports Are "Commercial."*

We agree with the district court's conclusion that, contrary to CMEP's contention, the reports contain "commercial" information: "INPO's constituent utility compa-

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[13] Memorandum and Order, *supra* note 1, at 7, J.A. at 290.

[14] In a civil suit on a FOIA claim, the "burden is on the agency to sustain" its action. 5 U.S.C. § 552(a)(4)(B).

[15] For FOIA purposes, a "person" may be a "partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

nies are assuredly commercial enterprises engaged in the production and sale of electrical power for profit [and] [t]he revelation of the details of the operations of their nuclear power plants . . . could materially affect their profitability in multiple ways."[16] INPO itself is a not-for-profit enterprise, but INPO's non-profit status is not determinative of the character of the information it reports; information may qualify as "commercial" even if the provider's (*i.e.*, INPO's) interest in gathering, processing, and reporting the information is non-commercial. *See Board of Trade*, 627 F.2d at 405-06 (the "plain language" of exemption 4 "does not in any way suggest that this information must relate to the affairs of the provider"; the exemption is "sufficiently broad to encompass financial and commercial information concerning a third party").

In *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983), we held that manufacturers of intraocular lenses had a "commercial interest" in health and safety data submitted to the FDA because the data would be "instrumental in gaining marketing approval for their products." *Id.* at 1290. Comparably, the commercial fortunes of INPO's member utilities, and the vendors whose products are appraised in the INPO reports, could be materially affected by the disclosure of health and safety problems experienced during the operation of nuclear power facilities.

B. *Are the INPO Reports "Confidential"?*

Turning to the "confidential" nature of this information, the precedent that guides us establishes two prime requirements. First, the agency must demonstrate that the information it seeks to shield "would customarily not be released to the public by the person from whom it was

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[16] Memorandum and Order, *supra* note 1, at 4, J.A. at 287.

obtained." *Board of Trade*, 627 F.2d at 404, quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). We conclude that the NRC has made this demonstration.[17]

Second, the agency must demonstrate that "disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." *9 to 5 Organization for Women Office Workers v. Board of Governors*, 721 F.2d 1, 9 (1st Cir. 1983). In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974), we focused upon two of those interests: the "need of government policy-makers to have access to commercial and financial data," *id.* at 767; and the need to "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* at 768. We also noted that Congress had advanced these justifications for "the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must." *Id.* at 769. Ultimately, we fashioned the following test:

> [C]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770 (footnote omitted). We conclude that the NRC has not established the impairment of its future information-gathering ability prerequisite to affirming the entry of summary judgment in its favor.[18]

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[17] *See infra* Section II.B.1.

[18] *See infra* Section II.B.2.

We reserved in *National Parks* the question whether the government could sustain its exemption 4 burden by proving "impairment" of interests other than the two cited in the test we delineated. *See id.* at 770 n. 17 ("We express no opinion as to whether other governmental interests are embodied in this exemption."); *see also Washington Post Co. v. HHS*, 690 F.2d 252, 268 n. 51 (D.C. Cir. 1982) (similarly reserving judgment). We now hold, *see infra* Section II.B.3, that the NRC may invoke exemption 4 on the basis of interests other than the two identified in our *National Parks* test; here again, however, because we are uncertain of the precise position the NRC seeks to advance, we remand the matter for further proceedings.

1. Are the INPO Reports "Customarily . . . Released to the Public"?

We agree with the district court that the NRC has met its threshold burden on this issue. As noted earlier, *see supra* pp. 3-4, the INPO reports receive fairly wide dissemination to individuals and organizations engaged in the nuclear power production process; nonetheless, receipt is premised upon compliance with INPO's stated policy of nondisclosure to third parties, and nothing in this record suggests that INPO's "limited distribution" policy is less than conscientiously observed. Because the class of recipients, while large, is well defined, and because an explicit nondisclosure policy is apparently adhered to in practice, we hold that the INPO reports meet this first confidentiality threshold. *Cf. Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985) (audit reports available to water supply corporation's members held not confidential; "what five thousand people may obtain *without even a pledge of nondisclosure* is not confidential") (emphasis added).

2. Would Disclosure Impair the NRC's Ability to Obtain Necessary Information in the Future?

The NRC's "impairment" claim under this prong of the *National Parks* test,[19] *see supra* p. 7, is not a model of clear statement. We endeavor next to examine its components.

First, the NRC points to "unequivocal statements" in the record "that INPO would not [voluntarily continue to] supply these reports to the NRC if the agency made them available to the public.[20] CMEP, however, urges us to treat these "self-serving" representations on INPO's part with "considerable skepticism" inasmuch as "it runs directly counter to the interests of INPO and its members for INPO to jeopardize its relationship with the NRC by refusing to voluntarily release its safety reports."[21]

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[19] No claim is pressed here that disclosure would "cause substantial harm" to INPO's "competitive position."

[20] Brief for the Appellee at 21. The principal statement cited appears in a letter to the NRC from Zack T. Pate, INPO's Chief Executive Officer, in which he stated: "We have now reached the conclusion that, in the event these documents are released, INPO will not furnish any confidential documents to the NRC in the future." Exhibit F, Affidavit of Angelina Howard, INPO Director of Communications (Aug. 30, 1985).

[21] Brief for Plaintiff-Appellant at 14-15. In fuller statement, CMEP argued:

> INPO is not a neutral third party that can afford to alienate the NRC by refusing to yield documents the Commission needs to perform its statutory duties . . . . Rather, the reports are designed to convince the Commission that the nuclear industry is adequately addressing safety problems and that the Commission need not further tighten its regulatory grip, as suggested by the [Presidential] Commission [that investigated the Three Mile Island accident]. . . . In short, it runs directly counter to the interests of INPO and its

(continued...)

Even if we were to assume that INPO would discontinue voluntary transmission to the NRC, however, it is not clear whether, or the extent to which, the Commission's future ability to obtain necessary information would be impaired. A "minor impairment," we have elsewhere observed, "cannot overcome the disclosure mandate of FOIA[;] the impairment [must be] significant enough to justify withholding the information." *Washington Post*, 690 F.2d at 269 (remanding case for the district court to make findings on "the *extent*" to which the government's ability to obtain information would be "impaired" by disclosure); *accord Pacific Architects & Engineers, Inc. v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974) (same).

We note, in this regard, that INPO has *not* suggested that it would discontinue either production of the reports here at issue, dissemination of those reports to its members, or any other aspect of its SEE-IN program — let alone that INPO itself would disband — were we to reject definitively the NRC's FOIA exemption plea.[22] Therefore, to show the requisite impairment of its information-gathering ability, the agency must persuade the court

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[21](...continued)

> members for INPO to jeopardize its relationship with the NRC by refusing to voluntarily release its safety reports.

Id.

[22] The district court observed:

> INPO is not regulated by the NRC, and is under no legal obligation to report anything to the NRC, or even to prepare reports at all. It is fully autonomous, and could abandon its peer review process altogether, or disband as easily as it came into existence.

Memorandum and Order, *supra* note 1, at 6, J.A. at 289. While INPO could indeed close up shop without the NRC's leave, nothing in this record so much as hints that INPO or its members would consider that final solution to this FOIA case within the realm of INPO's practical options.

either (1) that cessation of INPO's voluntary submission of these reports would in fact deprive the agency of the information contained therein, or (2) that alternative available means for obtaining the INPO reports would entail a significant risk that the value of the submitted reports would decrease.

The district court made no findings on these questions, observing only that "it is preferable to have the INPO reports furnished to the NRC voluntarily, rather than delivered up under compulsion in circumstances less conducive to candor, accuracy, and timeliness."[23] We agree, but were that proposition sufficient to overcome FOIA's disclosure mandate, our circuit's requirement that the agency provide a "*detailed justification* [of] the extent to which disclosure . . . will impair the government's ability to obtain necessary information [, supported by] *specific factual or evidentiary material*," *Pacific Architects*, 505 F.2d at 385 (emphasis added), would have little, or no, force. Why demand detail if the voluntary character of the submission suffices to shield the reports?

We note, first, the NRC's concession that it has ample statutory authority, under 42 U.S.C. § 2201(c),[24] to

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[23] Memorandum and Order, *supra* note 1, at 6-7, J.A. at 289-90.

[24] The relevant statutory provision reads:

> In the performance of its functions the Commission is authorized to—
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> . . .
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> (c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths to appear and testify, or to appear and produce documents, or both, at any designated place.

compel the production of the INPO reports, either by "institut[ing] a program of periodic issuances of subpoenas"[25] to INPO or its utility-members, or by requiring those utilities to submit the INPO reports as a condition of obtaining a license from the NRC.[26] However, even if the NRC could compel production of all INPO reports, the question remains whether compelled production would entail *qualitative* impairment of the information contained therein. Our precedents recognize that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own

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[25] Defendant's Answers to Plaintiff's Interrogatories ¶ 8(F), J.A. at 43.

[26] Brief for the Appellee at 27. Additionally, the agency's existing regulations, *see* 10 C.F.R § 50.73 and *infra* pp. 17-18, may encompass a requirement that its licensees submit these reports as a condition of license.

We emphasize that our focus here is exclusively on the likely impact of disclosure on the NRC's interest in continued receipt of the information it now obtains from INPO; on that question, the agency's ability to compel production of the INPO reports, should voluntary submission terminate, is a relevant consideration. *See Washington Post Co. v. HHS*, 690 F.2d 252, 268 (D.C. Cir. 1982) (mandatory nature of disclosure is "a factor [to be considered] in deciding whether the government's access to information is likely to be impaired"; "[i]f the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment"); *cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir.1974) (because holders of National Parks concessions are required to provide financial information to the government, "there is presumably no danger that public disclosure will impair the ability of the government to obtain this information").

We recognize that the agency may have substantial, indeed compelling, reasons why it would choose not to exercise the coercive powers at its disposal. Under the *National Parks* test as we develop it today, *see*, *infra* Section II.B.3, those concerns are more properly addressed as part of the agency's claim that other interests — *e.g.*, program effectiveness or efficiency — will be harmed by disclosure.

interests." *Association for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977), quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974); *see also Washington Post*, 690 F.2d at 268 ("If the government can enforce the disclosure obligation, *and if the resultant disclosure is likely to be accurate*, that may be sufficient to prevent any impairment.") (emphasis added). The NRC has asserted that disclosure would result in a "substantial risk that the reports . . . would become less valuable."[27] But at this juncture, that assertion lacks clear focus and solid factual support.

The Commission's presentation leaves us uncertain as to the contours of this facet of the NRC's impairment claim. To explain our difficulty in fathoming the Commission's position, we describe in more detail the nature of the information contained in the INPO reports. INPO obtains most of the *factual* material on which its reports are based from information filed with the NRC by INPO's member utilities — information that the NRC routinely makes available to the public.[28] INPO also obtains relevant data, however, from other, nonpublic sources, such as interviews with plant personnel during either routine site visits or detailed field investigations of particular safety-related events.[29] In addition, the O & MRs, *see*

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[27] Brief for the Appellee at 22.

[28] Under 10 C.F.R. § 50.73, all nuclear power plant licensees must submit "Licensee Event Reports" (LERs) within 30 days after discovery of a safety-related "reportable event." Approximately 2500 LERs are submitted annually to the NRC, and all are made available to the public. Declaration of Frederick Hebdon, Chief of the NRC's Program Technology Branch, ¶ 3-4 (n.d.), J.A. at 141-42.

[29] The parties call our attention to conflicting record evidence on the extent to which the INPO reports contain factual data not otherwise in the NRC's possession. For example, the NRC admits that

(continued...)

supra, p. 3, may discuss "nonsafety related incidents that are not required to be reported [to] the NRC but that one of INPO's members has brought to [INPO's] attention, or . . . event[s] or occurrence[s] which [have] been reported to INPO by one of its vendor participants."[30]

Quite apart from the factual material collected by INPO and included in its SEE-IN reports, INPO performs its own analyses of the reported events, *e.g.*, trend analysis "to determine if patterns of recurrence among events indicate underlying problems requiring action," and sequential risk analysis "to examine the actual sequence and all possible sequences associated with an event in

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[29](...continued)
"INPO['s] safety reports have not provided the NRC with any new base data that was not otherwise available to it." Plaintiff's Statement of Material Facts ¶ 8, J.A. at 266; Defendant's Response ¶ 8, J.A. at 263 ("Defendant admits the facts in this paragraph."). *See also* Defendant's Answers to Plaintiff's Interrogatories ¶¶ 4(J)(3), 9(J)(3), and 14(J)(3), J.A. at 32, 54 and 71 (conceding in identical language, that the SERs, SOERs and O & MRs "have not provided any *new* information which was not otherwise available but have provided *supplementary* information which is useful to the NRC") (emphasis added). If the NRC is attaching particular significance to a distinction between "new" and "supplementary" information, we fail to grasp what the distinction is or why it is significant.

At the same time, the Hebdon Declaration, *see supra* note 28, appears to contradict directly the NRC's admission of no "new base data" in the reports: "[S]ometimes the base data in an SOER is different from the information that the NRC has received through its LER system." Hebdon Declaration, *supra* note 28, ¶ 13, J.A. at 149; *see also id.* at ¶ 7 J.A. at 144 ("SERs often consist of additional data (to that contained in the LER on which the SER is based)"); *id.* at ¶ 16, J.A. at 151 ("O & MRs can be based on data which is not required to be reported to the NRC").

[30] Hebdon Declaration, *supra* note 28, ¶ 7, J.A. at 143.

order to reveal problems with design and operational practices that might not be detected otherwise." [31]

This dual aspect — factual and analytical — of the information the NRC receives from INPO suggests two ways in which the NRC's ability to obtain that information may be impaired by public disclosure. First, INPO's analyses may be conducted less vigorously, and in its brief to this court, the NRC so contends. The Commission asserts that "[i]f *INPO* knows that the reports will be publicly disclosed, its reports are *less likely to be entirely candid* and, therefore, helpful to the NRC."[32] We find the record barren, however, of any support for this assertion; the record evidence to which the NRC's brief refers does not, in fact, even suggest that INPO would perform its *analytical* tasks with less candor or thoroughness post-disclosure than it does at present. Rather, the evidence speaks to a related, but distinct, claim, that the *factual* basis of the INPO reports will be impaired.[33]

The claim that disclosure will impair the quality of the analysis is not implausible, particularly in light of the

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[31] Brief for the Appellee at 7 n. 4; *see also id.* at 18 ("more important, these records are more than dry recitations of objective 'facts'; they are chock full of independent analysis of INPO's staff").

[32] *Id.* at 22 (emphasis added).

[33] Declaration of Joseph Felton, Director of NRC's Division of Rules and Records ¶ 20, J.A. at 100 ("To the extent [that] INPO's [reports] are subject to public disclosure, it is reasonable to believe that *INPO members* would be less likely to frankly and candidly divulge any information beyond that required by current NRC rules[.]") (emphasis added); *see also* Brief for the Appellee at 9 ("If these [reports] were publicly disclosed, INPO's members would be less likely to divulge any information not required by current NRC regulations due to fears of adverse economic and publicity-related consequences[.]").

resemblance between INPO's analytical process and the agency "deliberative process" protected by exemption (b)(5), 5 U.S.C. § 552(b)(5). However, the agency's burden under FOIA requires more than plausibility.[34] The NRC has failed to put forward the "detailed justification" our precedents require. *Pacific Architects*, 505 F.2d at 385; *see also Orion Research Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980) (the "mere conclusory say-so of an agency that its ability to acquire information would be impaired will [not] suffice"; that conclusion must be "plausibly supported in some detail").

We mention in particular two shortcomings in the NRC's evidence. First, as noted above, *see supra* note 29, we find confusing and possibly contradictory evidence in the record concerning the presence *vel non* of any "base data" in the INPO reports that are otherwise not already in the agency's possession. Obviously, the *NRC*'s ability to gather information it already independently receives cannot be "impaired" should the utilities become less than forthcoming in providing that information to *INPO*.

Second, even were we to credit the NRC's assertions that *any* lack of candor on the utilities' part would deprive it of *some* necessary information, we remind the agency of its burden to persuade the reviewing court that "the impairment is significant enough to justify withholding the information." *Washington Post*, 690 F.2d at 269. This requires the agency to specify, with greater precision than the NRC has here, the kinds of information it fears it will be deprived of in the future and the uses to which that information is currently put. Only then can a court intelligently gauge the nature and significance of the impairment that may accompany disclosure.

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[34] This is particularly true where, as here, the agency is attempting to establish its impairment claim on a motion for summary judgment.

On remand, then, the NRC should be given the opportunity to document its necessarily uncertain prediction that disclosure would impair either the factual base, or analytical quality, of the INPO reports. To pass muster, the agency must spell out comprehensibly both the nature of the information of which it fears it will be deprived, and the nexus between the disclosure sought by CMEP and the anticipated impairment.

3. Will Disclosure Impair Other Interests Covered by Exemption 4?

As noted earlier, *see* p. 7 this circuit has not heretofore decided whether the test set forth in *National Parks* constitutes the exclusive means by which the government can sustain its exemption 4 burden, *i.e.*, whether information can be justifiably withheld where disclosure would harm the agency in ways unrelated to its ability to gather information in the future. The First Circuit recently confronted this precise question and, after carefully examining both the relevant legislative history and case law, concluded that "[i]n view of the legitimate governmental interest of efficient operation, it would do violence to the statutory purpose of exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities." *9 to 5 Organization*, 721 F.2d at 11; *see also id.* at 12 (Breyer, J., dissenting) (agreeing with the court's expansion of the *National Parks* test while disagreeing with the application of the expanded standard to the case before the court).

We find the First Circuit's reasoning persuasive; however, we again conclude that the NRC has not sustained its burden of specifying the relevant "governmental interest which the Congress sought to protect by enacting exemption 4 [or demonstrating] how that interest will be harmed by public disclosure of the specific information which has been requested." *Id.* at 10.

The NRC's "impairment of agency efficiency" contention rests, it appears,[35] on its assertion that "even if [it] could somehow get the same information it now receives from INPO in these reports" — *e.g.*, by periodic issuances of subpoenas, *see supra* p. 11 and notes 24-26 — "the sacrifice in the efficiency of its operations and the burdens it would necessarily bear in securing the information through other means would be too heavy."[36] We note, however, that there is a very real possibility that the NRC's existing regulations encompass a requirement that its licensees submit these reports. The relevant prescription, 10 C.F.R. § 50.73(c), states:

> The Commission may require the licensee to submit specific additional information beyond that required by [10 C.F.R. § 50.73(b)] if the Commission finds that supplemental material is necessary for complete understanding of an unusually complex or significant event.

The NRC's argument that it could not "demand that the licensees furnish it with copies of the reports as a condition to their status as licensees," [37] is backed up only by an NRC staff member's statement that plausibly could be interpreted to mean either that the Commission simply has not made such a demand in the past, or that it lacks the

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[35] We acknowledge that some of the confusion in the NRC's brief on this question can be traced to the uncertain state of our precedents in this area.

[36] *See, e.g.*, Brief for the Appellee at 29-30 ("Plaintiff's suggestion that the NRC could get by subpoena the information it now gets through INPO's voluntary cooperation . . . ignores. . . the practical problems that dot the subpoena route. . . . [T]he substantial burdens that the subpoena alternative would impose on the agency and the unavoidable delays in getting the information through the subpoena process show that coercion is not a reasonable alternative means for getting such information[.]").

[37] *Id.* at 26.

authority to do so under the regulation.[38] A linchpin of the NRC's argument in this case, we reiterate, is that the INPO reports are "necessary for complete understanding of . . . unusually complex or significant event[s]."[39]

We therefore remand the question whether the Commission has authoritatively construed the regulation to be inapplicable to third-party reports. If the Commission or the lower court interprets the regulation as authorizing the NRC to obtain third-party reports, the court should then obtain the Commission's views on the application of the regulation to the facts of the case; that is, in view of the regulation's authorization to require additional material if necessary for the Commission's understanding of "an unusually complex or significant event," does the regulation cover SERs, SOERs, and O & MRs? If so, the district court should afford the agency the opportunity to

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[38] The NRC points only to the following statement by Frederick Hebdon, Chief of the NRC's Program Technology Branch, in support of the statement quoted *supra* at note 37:

> Section 50.73(c) enables the staff to collect additional, more detailed factual information about an event from a licensee when it is felt such information is needed. To analyze a very complex event, the staff may need more or different information than that which is provided for in 50.73(b). Section 50.73(c) has never been construed by the staff to cover third party reports or information. To my knowledge, this section has never been used by the staff to request, from a licensee in writing, additional information about an event. Such requests are usually handled informally by a phone call.

Supplemental Declaration of Frederick Hebdon (Oct. 25, 1985) ¶ 3, J.A. at 237-38.

[39] *See, e.g.*, Brief for the Appellee at 10 ("The record before the district court also showed that the NRC needs the information that INPO's reports now contain."). Throughout this litigation, *see supra* pp. 8-16, with a view to *National Parks & Conservation Ass'n v. Morton*, 498 F.2d at 770, the NRC has argued insistently that disclosure will "impair [its] ability to obtain *necessary information* in the future."

show, if it so chooses, that exercising its full authority under this regulation would damage some identifiable agency interest relating to program effectiveness or efficiency. If, on the other hand, the regulation does not authorize the Commission to obtain third-party reports, the district court should then consider the NRC's contention that resort to other means of obtaining this information would significantly impair "efficient operation[s]" or "effective execution of [NRC's] statutory responsibilities," *9 to 5 Organization*, 721 F.2d at 11.

CONCLUSION

For the reasons stated, we vacate the district court's order directing summary judgment for the NRC. The Commission has not yet substantiated its claims that the disclosure it resists would impair either its ability to obtain necessary information in the future, or the efficient and effective performance of the regulatory responsibilities Congress has assigned to it. We therefore return this case to the district court for further proceedings consistent with this opinion.

It is so ordered.

BUCKLEY, *Circuit Judge*, concurring in part and dissenting in part:

There is an inherent hazard in the process by which our courts flesh out the meaning of a statue. Over time, judges adding another link to the precedential chain may become so intent on exploring the implications of the last preceding case that they lose sight of the statute itself and end up frustrating its purpose. Such is the case with the decision we issue today.

After reviewing the exemption's legislative history, we observed, in *National Parks*, that the exemption covered two categories of private commercial information in the government's possession: that which is voluntarily provided and that which is exacted by statute or regulation. 498 F.2d at 769. We concluded that Congress had

> a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

Id. The INPO reports clearly fall within the first category. Yet rather than apply exemption 4 in a manner consistent with the congressional purpose of encouraging the private sector to cooperate with government, we place it on notice that anyone who voluntarily provides the government with confidential information does so at significant risk.

The majority and I agree that the Reports are shielded from disclosure *if*, as the agency contends, the information they contain is confidential within the meaning of exemption 4. We part company on how that information is to be categorized. In *National Parks* this court established a test for determining this key element of section 552(b)(4):

> [A] commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following

> effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770. Given the court's finding as to the exemption's purposes, I read the first element of the test (in the case of information a person is not required to provide) to refer to the effect of disclosure on an agency's future ability to obtain necessary information *on a voluntary basis*. The court, however, now rewrites the test to provide that commercial information will be deemed "confidential" only if its disclosure would impair the government's ability to *compel* the production of like information in the future from whatever source, and it claims to do so on the authority of *National Parks* and *Washington Post*. Maj. Op. at 11-12 n. 26.

Neither case supports so radical a change. *National Parks* and *Washington Post* deal with information third parties have been required to provide government agencies. In each case, the court must decide whether public disclosure will impair the accuracy of future information received from those same parties even though its production is mandatory. Nowhere is it suggested that in applying the exemption, an agency's ability to obtain information is to be measured by what it might be able to compel from other sources were it to unleash the statutory powers at its disposal.

Taken alone, the phrase "ability to obtain" is capable of a broad range of interpretations. Exemption 4, however, must be applied within the scope of its statutory context and purpose. FOIA is a *disclosure* statute. It deals with information currently in an agency's possession, and with the nature and sources of that information. It does not require that the agency determine how it might coerce the production of information it presently receives to its satisfaction through cooperative means. In short,

there is no basis in the statute for the ruling we announce today; a ruling that is unwarranted by circuit precedent, at odds with precedent elsewhere,* and subversive of one of Congress' prime objectives, namely, to "encourag[e] cooperation by those who are not obliged to provide information to the government." *National Parks*, 498 F.2d at 769. In fact, it is hard to conceive of a rule more likely to discourage such cooperation, as citizens are now forewarned that confidential information they voluntarily provide may be disclosed whenever a court concludes that the agency has the power to compel the production of similar information from any other source.

My concern over today's decision goes beyond its emasculation of exemption 4. I fear we may be opening a vast new field for future litigation. What are the limits of a presumption that any information voluntarily provided under a promise of confidentiality is subject to FOIA disclosure if the production of similar information could be compelled? Would not such a standard force courts to adjudicate a host of hypothetical claims: Does the statutory power exist to compel disclosure? If the power exists, does it apply to the particular matter being sought; and, if it does apply, would program efficiency be impaired? — all this simply to determine whether the material is exempt from FOIA absent an invocation of these hypothetical powers. Maj. op. at 19. Given the sweeping reach of FOIA, are we not sanctioning a wholly novel form of suit?

As I concur in the court's adoption of the holding in *9 to 5 Organization*, Maj. op. at 17, I agree that on remand, the NRC may base its claim of exemption on the alternative ground of impairment of the efficient and effective performance of its regulatory responsibilities.

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* *Cf. General Electric Co. v. NRC*, 750 F.2d 1394, 1398 (7th Cir. 1984) (information exempt "if disclosure would . . . make it difficult for the agency to induce people to submit similar information to it in the future" (citing *National Parks*)).

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DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1943
(TPJ)

CRITICAL MASS ENERGY PROJECT,
Plaintiff,

v.

NUCLEAR REGULATORY COMMISSION,
Defendant,

INSTITUTE OF NUCLEAR POWER OPERATIONS,
Defendant-Intervenor.

MEMORANDUM AND ORDER

This FOIA case is once more before the Court on cross-motions for summary judgment following remand from the court of appeals.[1] The plaintiff, a consumer organization, is requesting copies of certain reports presently furnished voluntarily to defendant Nuclear Regulatory Commission ("NRC") by a former stranger to this litigation, the Institute of Nuclear Power Operations ("INPO"). INPO has, since remand, intervened as a co-defendant. Although this case bids fair to rival the saga of *Washington Post Co. v. U.S. Department of Health*

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[1] *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 644 F. Supp. 344 (D.D.C. 1986), *vacated and remanded*, 830 F.2d 278 (D.C. Cir. 1987).

and Human Services,[2] the Court will once again grant defendants' motion and dismiss the complaint.

I.

INPO is a private non-profit consortium of electric utility companies operating nuclear power plants in the United States. It produces, and circulates to its membership, the reports at issue which present the results of its own inquiries into significant safety-related events or experiences occurring at its members' nuclear power plants. INPO also furnishes copies of its reports to the NRC, upon the express condition, however, that NRC not make them public without INPO's consent, and INPO does not consent to plaintiff's request here. NRC has, thus, invoked FOIA's Exemption 4, 5 U.S.C. §§ 552(b)(4), to justify its refusal to comply with that request.[3]

The court of appeals found the INPO reports to possess all the characteristics of documents entitled to Exemption 4 status save one, and remanded for this Court's factual determination as to whether their disclosure pursuant to FOIA request would compromise a governmental interest sought to be served by the Exemption 4, either by impairing NRC's

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[2]Civ. No. 80-1681, Mem. Op. (D.D.C. Dec. 4, 1980), *reversed and remanded,* 690 F.2d 252 (D.C. Cir. 1982), *on remand,* 603 F. Supp. 235 (D.D.C. 1985), *reversed and remanded,* 795 F.2d 205 (D.C. Cir. 1986), *on remand,* Mem. Op. (D.D.C. Nov. 20, 1987), *reversed and remanded,* 865 F.2d 320 (D.C. Cir. 1989).

[3]Ironically, had the same reports been prepared directly by NRC's own investigators, using INPO's sources and techniques, they would likely be immune from disclosure under FOIA's Exemption 5. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Badhwar v. U.S. Dep't of the Air Force,* 829 F.2d 182 (D.C. Cir. 1987).

ability to obtain the reports in the future (specifically, information of the same quality they presently impart), or by diminishing NRC's own regulatory efficiency or effectiveness. *Critical Mass Energy Project*, 830 F.2d at 287.

II.

The determination mandated by the court of appeals requires "balanc[ing] the individual litigant's [i.e., the requestor's] need for information against the government's need to obtain the information in the future," *Washington Post Co.*, 690 F.2d at 258, and "the *extent* to which the government's ability to obtain [the] information would be impaired . . . against the public interest in disclosure." *Id.* at 269 (emphasis in original).[4] It also necessitates a prediction of sorts as to the nature of the INPO/NRC relationship without the protection of a FOIA exemption for INPO reports in NRC's possession.

Yet despite the bulk of the record before the Court, it is largely unrevealing as to how the defendants would react to a decision rendering the INPO reports disclosable under FOIA, other than INPO's unequivocal confirmation of the fact that one certain consequence will be the cessation of its practice of sharing them with NRC voluntarily.[5] Thenceforth NRC would have to resort to compulsion to get the reports, and, INPO declares, it would resist vigorously (and it represents that it is informed its individual members will resist as well).

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[4]The Court assumes that the "balancing" to be undertaken in Exemption 4 cases is an exception to, or at least a qualification of, the no-balancing rule generally observed in other FOIA contexts. *See Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971).

[5]INPO disclaims, for the present, any intention to stop preparing the reports altogether.

NRC and INPO are nevertheless fully in accord in one respect: the limited confidentiality the INPO reports presently enjoy, i.e., their general unavailability to the public at large, is indispensable to the quality of the information they contain. A host of declarants and affiants from both NRC and INPO (all of whom are highly qualified nuclear professionals possessing both years of relevant experience and the responsibility of currently relevant office) ardently attest to the importance of that circumstance as assuring maximum candor on the part of INPO's sources for the substance of its reports.[6]

The Court also perceives the position taken by NRC in this dispute as being more than perfunctory lip service to its commitment to INPO not to divulge the reports. From the NRC declarations alone it is apparent that NRC is convinced that it will experience a genuine loss of valuable regulatory intelligence, one way or another, if the INPO reporting process is made subject to general public scrutiny. NRC believes that it is now deriving from the INPO reports, and contemporaneously with the industry itself, the most insightful thinking of the best informed people within the industry on matters of safety, a commodity otherwise unavailable to it except through

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[6]NRC and INPO contend that the true value of the reports to the industry (and to NRC) lies not in the factual information they impart but, rather, in the insight they afford to as to "root causes" of the events and experiences which are frequently found to involve human error. The INPO personnel who compile the reports endeavor to get members' officials and plant personnel having knowledge of such events and experiences to engage in subjective self-critical or colleague-critical "rumination" about them. Were the reports to become public, candor would suffer, and, hence, diminish the value of the reporting process itself to INPO, to NRC, and ultimately to the public. *See, e.g.*, the affidavits of T.J. Sullivan (INPO) of August 26, 1988, and Edward L. Jordan (NRC) of October 28, 1988.

the good offices of an unofficial, industry-friendly organization such as INPO.

For its part plaintiff suggests no particularized need of its own for the reports. It is thus remitted to the general public interest in disclosure for disclosure's sake to support its request. To be sure, the public has an interest of significantly greater moment than idle curiosity in information bearing upon the safety of nuclear power plants. But so does NRC, and so do INPO and its members, and of a much more immediate and direct nature, in addition to their share of the general public interest.

Plaintiff also offers no affirmative evidence of its own to contradict defendants' declarants and affiants as to the importance of the information to the NRC, as to the extent to which NRC's ability to obtain it might be impaired were the INPO reports to be made public, or as to whether the NRC would be otherwise diminished in efficiency or effectiveness thereby. Plaintiff's case consists entirely of common sense inferences it asks the Court to draw from seeming concessions made by NRC to several of its discovery initiatives. The gist of those inferences is that the assertions of the NRC and INPO declarants and affiants are not to be credited, or at least not taken at face value.

For example, plaintiff argues, INPO members are already required to submit "licensee event reports" to NRC which are routinely made available to the public, although often containing revelations of human error, yet are conceded by defendants to be truthful as far as they go.[7] Moreover, plaintiff

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[7]The relationship between the "licensee event reports" and the INPO reports at issue, for defendants' pruposes, is illustrated by T.J. Sullivan's affidavit of February 20, 1990, and the declaration of Jack E. Rosenthal (NRC) of February 21, 1990, filed *in camera* post-hearing under seal at the Court's request. In certain respects that relationship resembles that of hospital records of patient care to peer review committee proceedings of particular cases. *See Bredice v. Doctors Hosptial, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

suggests, candor on the part of sources interviewed by INPO is more likely to be inhibited by fear of summary discipline or reprisal by an employer (or NRC) than by apprehension of eventual public exposure for confessions of job-related mistakes. Yet nothing about the current reporting process protects an INPO source's anonymity from any of the multiple intra-industry recipients of the reports, including the source's own employer.[8] Finally, plaintiff observes, NRC wields the whip hand: not only does it have subpoena and near-plenary regulatory powers should it choose to use them to get the INPO reports, NRC can also effectively hold the licenses of INPO members hostage until it gets what it wants, in terms of candor, from anyone in the industry.

III.

The Court finds the effect of the defendants' multiple declarations and affidavits, in the aggregate, to exceed the sum of their parts, and to carry defendants' burden of establishing entitlement to the exemption they claim for the INPO reports. Taken together they evince a symbiosis in the relationship between NRC and INPO which the Court foresees as being damaged were the INPO reports in NRC's possession to be subject to FOIA disclosure. Whether or not the reporting process would truly experience a loss of candor — an issue neither more declarations nor a parade of witnesses could definitively resolve in advance of the event — both NRC and INPO share the conviction that it would. The consequence would be that the information now freely shared by INPO with NRC would be withheld until it was demanded under some form of compulsion. The demand would have to be enforced, which would

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[8]Among other representations made by NRC or INPO for the first time at oral argument, which had nowhere found direct expression in their written submissions earlier, is one to the effect that INPO reports never beget discipline for sources from either an employer or NRC. It is now confirmed by the T.J. Sullivan affidavit of February 20, 1990.

likely precipitate both acrimony and some form of litigation with attendant expense and delay.

NRC and INPO would then no longer be collaborators in a quest for optimum industry safety, putting aside their other regulatory differences. If not outright antagonists, they would at best be wary allies, working independently of one another, duplicating one another's efforts, and mistrustful of one another's initiatives or overtures. That deterioration of the relationship, in this Court's opinion, represents a sufficient showing that NRC's efficiency and effectiveness would be impaired were it not permitted to honor its commitment to INPO to keep the INPO reports in confidence, and it is, therefore, this 2nd day of March, 1990,

ORDERED, that defendants' motion for summary judgment is again granted; and it is

FURTHER ORDERED, that the complaint is, once more, dismissed with prejudice.

/s/Thomas Penfield Jackson

Thomas Penfield Jackson
U.S. District Judge

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 11, 1991 Decided April 30, 1991

No. 90-5120

CRITICAL MASS ENERGY PROJECT,
Appellant

v.

NUCLEAR REGULATORY COMMISSION,

and

INSTITUTE FOR NUCLEAR POWER OPERATIONS,
Appellees

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 84-1943)

Paul R.Q. Wolfson, with whom *David C. Vladeck*, *Alan B. Morrison* and *Eric R. Glitzenstein* were on the brief, for the appellant.

Peter R. Maier, Attorney, United States Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

General, *Jay B. Stephens*, United States Attorney, *Leonard Schaitman*, Attorney, United States Department of Justice, *John Cordes*, Solicitor, Nuclear Regulatory Commission, and *Carolyn F. Evans*, Attorney, Nuclear Regulatory Commission, were on the brief, for appellee Nuclear Regulatory Commission.

James D. Miller with whom *Deborah J. Andrews* was on the brief, for appellee Institute of Nuclear Power Operations.

Before EDWARDS, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* RANDOLPH, in which *Circuit Judge* WILLIAMS joins.

EDWARDS, *Circuit Judge:* This appeal involves a claim under the Freedom of Information Act ("FOIA") regarding certain reports dealing with nuclear power plant safety. The disputed reports are prepared by the Institute for Nuclear Power Operations ("INPO"), a utility consortium; since 1982, INPO has shared these reports with the Nuclear Regulatory Commission ("NRC" or "Commission") pursuant to an agreement providing for the free exchange of nuclear information. The appellant, Critical Mass Energy Project ("Critical Mass"), seeks to secure copies of the reports from the Commission under FOIA.

In 1984, the NRC refused to release the INPO reports to Critical Mass, citing FOIA's exemption for confidential commercial information; Critical Mass then brought suit challenging the agency's action. The District Court issued a summary judgment in favor of the NRC; however, that judgment was vacated on appeal and the case was remanded to the District Court for further proceedings. *See Critical Mass Energy Project v. NRC*, 830 F.2d 278 (D.C. Cir. 1987) ("*Critical Mass I*"). On remand, the District Court once again denied the appellant's FOIA request, holding that the INPO reports were protected from disclosure under FOIA Exemption 4. Summary

judgment was awarded to the Commission, and Critical Mass has appealed from that judgment.

On the record before us, we can find no basis to conclude that disclosure of the relevant reports would be likely to result in any significant impairment of either the effectiveness or efficiency of the NRC by virtue of anticipated antagonism in the relationship between INPO and the Commission. We therefore reverse the judgment of the District Court on this point. In addition, because we find that genuine issues of material fact remain concerning the likely effects of disclosure on the Commission's information-gathering ability, we remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. *Facts*

In the wake of the Three Mile Island accident, the nuclear electric utility industry formed INPO, a voluntary membership organization designed to promote safety and reliability in nuclear power plant operations through peer review. INPO, which is comprised of and funded by utility companies that operate or construct nuclear plants in the United States, employs approximately 400 engineers and other staff. One of INPO's principal programs is the Significant Event Evaluation and Information Network ("SEE-IN"), a system for collecting, analyzing and sharing information concerning construction and operations experiences within the nuclear power industry.

As part of SEE-IN, INPO produces three types of reports on nuclear power plant operations: Significant Event Reports ("SERs"); Significant Operating Event Reports ("SOERs"); and Operation & Maintenance Reminders ("O&MRs"). As their titles suggest, SERs and SOERs involve operating events at nuclear facilities deemed "significant" by INPO engineers. SERs include descriptions of the events, discussions of their possible causes and effects and INPO's analyses of the prob-

lems identified; SOERs are more detailed follow-up analyses, containing more wide-ranging, generic recommendations to utilities regarding plant construction, design and operation. O&MRs describe less significant operating and maintenance problems encountered in specific plants and discuss the means used to correct them. In preparing the SERs, SOERs and O&MRs, INPO analysts solicit comments and evaluations from working-level employees who have some familiarity with the events and problems raised in the reports.

INPO currently distributes copies of its SEE-IN reports to all INPO members and "participants,"[1] to the Nuclear Safety Analysis Center (a membership organization of utilities engaged in the commercial production of electricity) and to Nuclear Electric Insurance Limited (an insurer of INPO utilities). In addition, INPO provides copies of particular reports to vendors whose products are mentioned in those reports, and to outside consultants and contractors where necessary to take corrective action suggested by the reports. Pursuant to a 1982 Memorandum of Agreement providing for the free exchange of nuclear safety information between INPO and the Government, INPO also transmits copies of all SEE-IN reports to the Commission. INPO sends its reports to each of the foregoing recipients with an understanding that the reports will not be disclosed to additional third parties without INPO's consent.[2]

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[1]INPO's participants are domestic companies that serve as suppliers to nuclear plants and international utility organizations that operate or construct nuclear facilities in foreign countries.

[2]SEE-IN reports contain the following statement:

> Reproduction of not more than ten copies by each recipient for its internal use or use by its contractors in the normal course of business is permitted. This report should not be otherwise transferred or delivered to any third person, and its contents should not be made public, without the prior agreement of INPO.

Exhibits A, B & C to Supplemental Affidavit of Terence J. Sullivan, *reprinted in* Joint Appendix ("J.A.") 553, 574, 589.

B. *The Decision in* Critical Mass I

In 1984, Critical Mass filed a FOIA request seeking access to INPO reports in the Commission's possession. The NRC denied the request on the grounds that the reports were protected from disclosure under FOIA Exemption 4, which shields "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1988). Critical Mass thereupon brought suit in the District Court challenging the Commission's decisions. Finding that the records properly came within the ambit of Exemption 4, the District Court granted the Commission's motion for summary judgment.

Following argument before another panel of this court, the District Court's judgment was vacated on appeal. The decision in *Critical Mass I* first notes that, under FOIA, the agency carries the burden of justifying the decision not to disclose the undisputed reports. *Critical Mass I*, 830 F.2d at 281 & n.14. The decision then observes that our precedent has established "two prime requirements" for confidentiality. *Id.* at 281.[3] First, the agency must show "that the information it seeks to shield would customarily not be released to the public by the person from whom it was obtained." *Id.* (internal quotation omitted). The decision finds this requirement to be satisfied by INPO's limited distribution of its reports to a well-defined (albeit large) class of recipients and its articulated policy forbidding unauthorized disclosure of the reports to third parties.

Second, the *Critical Mass I* decision declares that "the agency must demonstrate that disclosure [would] . . . harm a specific interest that Congress sought to protect by enacting the exemption." *Id.* (internal quotation omitted). On this point, the court notes that, under the holding of *National Parks &*

[3]The court found that, apart from the issue of their confidentiality, the INPO reports came within the scope of Exemption 4 because they were "commercial" and had been "obtained from a person." *Id.*

Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), we have recognized two such protected interests: (1) the Government's need to have access to commercial and financial data and (2) the need to safeguard persons submitting such data to the Government from the competitive harms that might result from general publication. Focusing on these interests, *National Parks* established the following test for the application of Exemption 4:

> [C]ommercial or financial matter is "confidential" . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information is obtained.

National Parks, 498 F.2d at 770 (footnote omitted). In the decision under review in *Critical Mass I*, the District Court had relied on the first prong of this test, finding that disclosure of the INPO reports would be likely to impair the Commission's future ability to acquire the information they contained.[4]

This court rejected the judgment of the District Court in *Critical Mass I* for lack of evidentiary support in the record. INPO had made no contention that it would discontinue either preparing the reports or disseminating them to its members if disclosure were required under FOIA; INPO had merely represented that it would no longer voluntarily submit the reports to the Commission. Accordingly, the decision in *Critical Mass I* holds that, in order to show a significant impairment to its information-gathering ability, the Commission had to demonstrate "either (1) that cessation of INPO's voluntary submission of these reports would in fact deprive the agency of the information contained therein, or (2) that alternative means for obtaining the . . . reports would create a significant risk that . . . [their] value . . . would decrease." 830 F.2d

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[4]There had been no contention that disclosure of the reports would have had adverse competitive effects upon INPO.

at 283. There was no dispute on the first point because the Commission had conceded that it possessed "ample statutory authority" to obtain the INPO reports by compulsory means. *Id.* On the second point, however, the parties disagreed over the possible effect of public disclosure on the quality of the information and analyses in the reports. Because the District Court had made no findings on this second point, the case was remanded to allow the Commission to document its "necessarily uncertain prediction," *id.* at 286, that disclosure of the INPO reports would result in "impairment . . . significant enough to justify withholding the information." *Id.* (*quoting Washington Post Co. v. HHS*, 690 F.2d 252, 269 (D.C. Cir. 1982)).

In remanding, the decision in *Critical Mass I* amplifies somewhat on the *National Parks* test, indicating that, with respect to the question of confidentiality under Exemption 4, nondisclosure also may be appropriate if the agency can show that public disclosure will significantly harm the agency's interests in its efficient operations or in the effective execution of its statutory responsibilities. *Critical Mass I*, 830 F.2d at 286-87. Thus, the District Court was instructed to afford the Commission the opportunity to demonstrate that disclosure of the INPO reports would damage "some identifiable agency interest relating to program effectiveness or efficiency." *Id.* at 287.

Following the decision in *Critical Mass I*, INPO intervened as a co-defendant. After additional proceedings before the trial court, summary judgment was once again awarded in favor of the NRC. *Critical Mass Energy Project v. NRC*, 731 F. Supp. 554 (D.D.C. 1990). In issuing this judgment, however, the trial court declined to rely on any likely impairment to the Government's information-gathering capability, deeming the effects of disclosure on the quality of the information contained in the INPO reports "an issue neither more declarations nor a parade of witnesses could definitively resolve in advance of the event." *Id.* at 557. Instead, the District Court found that

disclosure would be likely to diminish the Commission's regulatory efficiency and effectiveness.

The District Court assumed that if disclosure were required under FOIA, INPO would resist future Commission attempts to obtain access to its reports, and predicted that Commission efforts to acquire the reports by compulsory means would engender "both acrimony and some form of litigation with attendant expense and delay." *Id.* Thus, the trial court concluded that disclosure would change the relationship between the Commission and INPO from one of "collaborators in a quest for optimum industry safety" into one involving, "[i]f not outright antagonists, . . . at best . . . wary allies, working independently of one another's efforts, and mistrustful of one another's initiatives or overtures." *Id.* On the strength of this conclusion, the District Court held that the Commission's "efficiency and effectiveness would be impaired were it not permitted to honor its commitment to INPO to keep the INPO reports in confidence." *Id.* Accordingly, the trial court again found the reports to be protected from disclosure under FOIA Exemption 4, and entered summary judgment for the Commission and INPO. The present appeal ensued.

II. ANALYSIS

A. *The Impact of Disclosure Upon the Commission's Efficient Operations and Effective Execution of Its Statutory Responsibilities*

Critical Mass contends that reversal is required because the District Court had no basis upon which to hold that the Commission's "efficiency and effectiveness would be impaired were it not permitted to honor its commitment to INPO to keep the INPO reports in confidence." 731 F. Supp. at 557. We agree.

For one thing, the trial court recognized that, other than INPO's assertion that it would no longer *voluntarily* submit its reports to the Commission, the record is "largely unrevealing as to how the defendants would react to a decision render-

ing the INPO reports disclosable under FOIA." *Id.* at 556. And, as noted above, the Commission concedes that it has "ample statutory authority . . . to compel the production of the INPO reports." *Critical Mass I*, 830 F.2d at 283-84. Furthermore, on the record before us, there is no evidence whatsoever to support the District Court's holding that disclosure of the INPO reports will significantly impair the effectiveness or efficiency of the agency by virtue of anticipated antagonism in the relationship between NRC and INPO.

Whatever the ultimate disposition of this case, the Commission and INPO will still share a common goal of promoting nuclear power plant safety. Moreover, INPO, as the representative of the nuclear power industry, will continue to possess a powerful incentive to cooperate with the Commission in the pursuit of this goal. Through such concerted efforts, INPO has a first-hand opportunity to demonstrate the efficacy of industry self-regulation to the Government agency responsible for regulating nuclear power.[5]

Even were we to accept the District Court's finding that the relationship between INPO and the Commission would somehow suffer if the reports lost their confidential status, however, we could not uphold the trial court's application of Exemption 4 on this basis. In premising its summary judgment award solely on the possibility that disclosure of confidential records might create friction between a Government agency and the preparer of those records, the District Court misconstrued the type of "identifiable agency interest relating to program efficiency" upon which an Exemption 4 claim legitimately can be based.

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[5]Indeed, the interests of the Commission and INPO have been entirely in accord throughout this litigation; both parties have opposed disclosure of the INPO reports on the grounds that public access would impair their quality. If the need for limited circulation of these records is so tenuous, however, that it cannot be demonstrated, we would hardly expect INPO to jeopardize its valuable working relationship with the Commission over their disclosure.

The decision in *Critical Mass I* recognizes that the NRC might have "substantial, indeed compelling, reasons why it would choose not to exercise the coercive powers at its disposal" to require INPO to share its reports if they are not voluntarily furnished. 830 F.2d at 284 n.26. But no such "substantial" or "compelling" reasons have been shown in this case. In *Critical Mass I*, the NRC had argued that disclosability would require it to resort to its subpoena power in order to obtain INPO reports in the future. Stressing the "unavoidable delays" and "practical problems that dot the subpoena route," the Commission had claimed that these compulsory procedures were "not a reasonable alternative means for getting . . . [the] information." *Id.* at 286 n.36. The NRC now concedes that it can obtain the INPO reports by requiring nuclear plant licensees to file INPO reports with the Commission pursuant to its licensing regulations. And, the Commision has pointed to nothing in the record to indicate that use of its regulatory authority, a far less burdensome method for obtaining information than the subpoena process, is not "a reasonable alternative means" for it to acquire INPO reports (apart from possible effects on the quality of the reports). There is no evidence suggesting either that licensees would disobey regulations requiring them to submit copies of INPO reports to the Commission promptly after receiving them from INPO, or that the processing of these submissions would impose a substantial burden upon the Commission's resources.

Nor did the District Court base its decision upon any such significant impairment to the agency's efficiency interests. The only alleged "damage to some identifiable agency interest" cited by the District Court was the possibility that disclosure might spawn litigation between the Commission and INPO, along with "attendant cost and delay." Were these possible effects sufficient to justify application of Exemption 4, however, a person submitting valuable information to the Government voluntarily could dictate whether that information was confidential for purposes of FOIA; and, this third-party control could be

achieved even with respect to information that is otherwise attainable by the agency through regulation. So long as the third-party threatened to resist production of the information if it were found subject to public dissemination, the agency could base an exemption claim on alleged adverse effects to its operations that exercise of its coercive power would likely entail. By thus allowing the confidential status of information to depend entirely upon the will of the party submitting that information to the Government, we would ignore the law of this circuit holding "that the test for confidentiality is an objective one." *National Parks*, 498 F.2d at 766. We always assume that a request for confidentiality is based in part on the subjective preferences of the parties, but those preferences must be supported by objective justifications.[6]

Although our opinion in *Critical Mass I* recognizes agency interests in efficiency and effectiveness, the decision did not purport to change the law of the circuit regarding the objective test of confidentiality. Indeed, *Critical Mass I* left but a small window of opportunity to the NRC "to show, if it so [chose], that exercising its full authority [to compel disclosure of the INPO reports through] regulation would damage some identifiable agency interest relating to program effectiveness or efficiency." 830 F.2d at 287. The court surely did not mean to suggest that the agency could satisfy this test with a mere suggestion that those against whom the regulation will be enforced will be unhappy.

On the record before us, we can find no evidence to support a holding that the NRC's resort to the exercise of regulatory authority to secure the INPO reports will significantly impair "some identifiable agency interest relating

[6]Thus, we made it clear in *Critical Mass I* that, in order to prove "confidentiality" under Exemption 4, "the agency must demonstrate that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." 830 F.2d at 281 (internal quotation omitted). This is an objective test, and it is not limited by the parties' preferred means of doing business in connection with their exchange of information.

to program effectiveness or efficiency." *Critical Mass I*, 830 F.2d at 287. We therefore reverse the judgment of the District Court on this point.

B. *The Impact of Disclosure Upon the Commission's Information-Gathering Ability.*

Information will also be deemed confidential for purposes of Exemption 4 if "disclosure of the information is likely . . . to impair the Government's ability to obtain necessary information in the future." *National Parks*, 498 F.2d at 770. As noted earlier, the District Court did not premise its grant of summary judgment on this ground. Both parties, however, have addressed this possible basis for nondisclosure in their briefs and at oral argument, and so we may properly consider whether the District Court's summary judgment award could rest upon the likely impairment to the Commission's information-gathering ability. *See Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 326 (D.C. Cir.) (appellate court may affirm grant of summary judgment on ground not relied upon by lower court, provided opposing party has had fair opportunity to dispute facts material to new theory), *cert. denied*, 459 U.S. 839 (1982).

We initially note that the information contained in the INPO reports is sufficiently important to the Commission's exercise of its statutory responsibilities to be "necessary information" under *National Parks*. *See Washington Post Co.*, 690 F.2d at 268. It is true that INPO reports contain essentially the same objective data concerning safety-related incidents that the Commission already obtains directly from reports prepared by licensees.[7] However, INPO reports offer candid analyses from a diverse group of industry professionals; and many of these analyses come from persons other that those who are assigned to prepare the "official" incident reports for the NRC.

[7]Under 10 C.F.R. § 50.73 (1990), licensees must prepare and submit Licensee Event Reports ("LERs") within 30 days of discovery of any safety-related "reportable event" containing objective data concerning that event.

There can be no doubt that access to the insights of the knowledgeable INPO analysts is an invaluable benefit to the Commission in its attempts to fullfill its broad statutory mandate to promote safety in the nuclear power field.

The remainder of our inquiry is narrowly circumscribed by the concessions of the parties and the prior proceedings in this case. First, it is undisputed that, whether or not INPO reports are disclosed to the public, INPO will continue to create those reports, will prepare them with the same degree of diligence as it has in the past and will distribute them to its members. Second, the Commission has expressed confidence that it will be able to gain access to those reports from licensees, and INPO has not suggested that it can prevent its members from submitting the reports to the agency pursuant to Commission regulations. Third, the INPO reports traditionally have been widely distributed to all INPO members, to all domestic and some international nuclear utilities, to various contractors and suppliers, to persons engaged in research associated with nuclear safety, and to NRC agents and officials. The limited question before us, then, is whether the *qualitative value* of the reports would decrease if they became available to the public-at-large.

Throughout these proceedings, the Commission and INPO have argued that the confidentiality of INPO reports is critical to their accuracy and value. They note that INPO engineers base their reports largely on subjective, often self-critical, input solicited from working-level employees at the sites of the incidents under examination. The Commission and INPO argue that these employees might not speak as freely about their involvement in such incidents or offer their theories of possible causes of safety incidents if they knew such information would be more generally available to the public-at-large. As a result, these parties claim, disclosure would seriously diminish the value of the INPO reports.

We fully agree that the Commission would be justified in withholding the INPO reports if limiting their circulation were

truly necessary to maintain their quality. However, we have searched the present record in vain for any evidence that would justify such a finding.

From the evidence before us, it is unclear that the employees whose input is solicited for INPO reports either know or care about the confidential nature of their statements. As noted above, INPO reports are distributed not only to the Commission, but also to all domestic nuclear utilities, some international utilities, plant suppliers and an occasional consultant or contractor. Thus, while these records are not generally available to the public-at-large, they do receive wide distribution throughout the nuclear energy community. Moreover, employees seem perfectly willing to talk with INPO investigators even though it is understood that their comments will be reviewed by their employers and by federal regulators. Critical Mass claims that, based on the existing broad dissemination of INPO reports, whatever candor currently finds its way into the INPO reports will not be significantly reduced by the prospect that the reports might also be made available to the general public.

Responding to Critical Mass' claims, the Commission and INPO argue that nuclear plant employees are comfortable speaking candidly within the nuclear power community, where their speculations and ruminations about plant events are unlikely to be misunderstood or taken out of context. The Commission and INPO claim, however, that employees would be reluctant to talk freely if they knew that their subjective comments might publicly embarrass colleagues or cast an unfavorable light on the industry generally. We cannot determine whether the views of Critical Mass or the Commission and INPO are correct; on the present record, the effects of disclosure upon employee candor simply cannot be gauged with any degree of confidence. The record contains absolutely no testimony from working-level employees regarding the importance of confidential treatment of INPO reports to their willingness to speak to INPO analysts. In fact, the records fails

to demonstrate whether the employees interviewed by INPO analysts are even informed or aware of INPO's current limited distribution policy.[8]

The only evidence presented before the District Court on this critical point were affidavits from officials of the Commission and INPO theorizing that disclosure would be inimical to employee candor. Such self-interested speculations by officials of the entities resisting disclosure, however, are hardly the type of evidence upon which a finding of likely impairment can be based.

We therefore conclude that a genuine dispute of material fact remains concerning the effects of disclosure on the quality of INPO reports and remand to the District Court for additional proceedings directed to this question. As in *Critical Mass I*, we recognize that any finding by the District Court on this issue may admit of some uncertainty. This is not fatal to a disposition of this case, however, because the adverse effects of disclosure for purposes of Exemption 4 need not be proven with mathematical certainty. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). The District Court should review the evidence submitted by the parties and, as a trial court must do in countless other contexts, resolve material disputes of fact and offer a legal judgment based upon its factual findings, bearing in mind that the NRC carries the "burden of demonstrating that these

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[8]Nor is it entirely clear to what extent employees in fact risk exposure by speaking to INPO representatives. The reports do not identify the sources of the information on which they are based, and subjective data from interviewed employees enters the final reports only after being sifted and filtered by the analytical process through which the reports are prepared. Thus, insofar as the Commission or INPO may claim that employee fear of retaliation would inhibit frank discussion, it is unclear whether any such fear would be realistic. *But see* Transcript of Deposition of Terence J. Sullivan, *reprinted in* J.A. at 448-49 (containing the statement of INPO's Executive Vice President that, in at least some cases, an informed reader might be able to deduce the names of employees involved in reported incidents).

documents are within FOIA exemption 4," *Critical Mass I*, 830 F.2d at 281, and that the issue is one of "necessarily uncertain prediction," *id.*, at 286.

Evidence relevant to the court's inquiry would include details concerning the full extent to which INPO reports are currently circulated, to determine whether their limited confidentiality is truly maintained; testimony or affidavits from employees interviewed by INPO analysts concerning the importance of limited circulation to their willingness to speak freely; and any evidence indicating the degree to which employees are currently aware of and reasonably rely on the limited circulation of INPO reports as a prerequisite to speaking to interviewers. *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (reviewing evidence concerning effects of public disclosure upon peer reviews).

III. CONCLUSION

For the reasons stated, we reverse the judgment of the District Court and remand for further proceedings.

So ordered.

RANDOLPH, *Circuit Judge, concurring,* in which *Circuit Judge* WILLIAMS joins: Section 552(b)(4) of the Freedom of Information Act exempts from disclosure "commercial . . . information obtained from a person and . . . confidential." This is rather straightforward language. The information must be commercial and the government must have received it from another. There is no doubt that the reports INPO voluntarily provided to the Nuclear Regulatory Commission fit that description. Are they "confidential"? If ordinary usage controlled, there would also be no doubt that they were. The reports are "conveyed [and] acted on . . . in confidence" and they are "not publicly disseminated." Webster's Third International Dictionary 476 (1981).

In light of our decision in *National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974), however, it is not enough to satisfy the language of exemption four. *National Parks* added — or, as has been said, "fabricated, out of whole cloth" — an additional requirement that must be met before confidential information is exempt from disclosure. Note, *Trade Secrets and the Fifth Amendment,* 54 U. Chi. L. Rev. 334, 364 (1987). The following "objective" test must be satisfied: information qualifies for exemption as "confidential" if its disclosure would impair the government's ability to obtain necessary information in the future, or if its disclosure would place the source of information at a competitive disadvantage. *National Parks,* 498 F.2d at 770.

If this were a question of first impression, I would apply the common meaning of "confidential" and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court. I see no legitimate basis for a court's adding some two-pronged "objective" test relating to the government's need for the data and the consequences of destroying its confidential nature. Information not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than objectively measurable harm. In business affairs

as in personal affairs, there are many things people simply prefer to keep to themselves or to reveal to others only on a confidential basis. In applying exemption four, some courts have asked whether "disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 9 (1st Cir. 1983). The "interests" are then defined, as in *National Parks*, as agency efficiency or competitive injury. But the "specific interest," indeed the only interest, apparent in the statutory language is confidentiality and that interest is necessarily harmed by disclosure. The argument against this is that parties, by designating the information they provide as confidential, would wind up controlling whether it is publicly revealed. One may reasonably ask what is wrong with such a system. Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 195-202 (1977). At any rate, the argument is one of legislative policy. It is not based on any ambiguity in the language of the statute. *See West Virginia Univ. Hosps., Inc. v. Casey*, 59 U.S.L.W. 4180, 4184-85 (U.S. Mar. 19, 1991); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

I am, however, not at liberty to follow the common sense meaning of exemption four. This court has endorsed the *National Parks* definition many times, and it was applied by the first panel in this case. *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 282 (D.C. Cir. 1987). I am thus bound not only by the law of the circuit, but also by the law of the case, which also prevents me from following Judge Buckley's persuasive dissent in *Critical Mass I* arguing that the *National Parks* test should not be further extended to force disclosure if the government's "future ability to obtain necessary information *on a voluntary basis*" would be impaired, as it surely will be in this case. 830 F.2d at 288 (emphasis in original). In view of these contraints, and the fact that the decision here does not expand upon *National Parks*, I concur.

FILED
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CONSTANCE L DUPRE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1990

No. 90-5120

CRITICAL MASS ENERGY PROJECT,
Appellant,

v.

NUCLEAR REGULATORY COMMISSION, *et al.*

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

(Civil No. 84-01943)

O R D E R

The Suggestions For Rehearing *En Banc* and appellant's response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular, active service voted in favor of the suggestions. Accordingly, it is

ORDERED, by the Court *en banc,* that the suggestions are granted and this case will be considered and decided by the Court sitting *en banc.* It is

FURTHER ORDERED, by the Court *en banc,* that the judgment of the panel filed on April 30, 1991 be, and the same hereby is, vacated.

A future order will govern further proceedings.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

By: Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

No. 92-1043

In the Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT, PETITIONER

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether reports that are submitted by a private person to a federal agency on a voluntary basis, and that are not customarily made public by the submitter, are exempt from mandatory public disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-33a) is reported at 975 F.2d 871. The opinion of the court of appeals panel (Pet. App. 72a-89a) is reported at 931 F.2d 939. The opinion of the district court (Pet. App. 65a-71a) is reported at 731 F. Supp. 554. A prior opinion of the court of appeals (Pet. App. 42a-64a) is reported at 830 F.2d 278. A prior opinion of the district court (Pet. App. 36a-41a) is reported at 644 F. Supp. 344.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 34a-35a) was entered on August 21, 1992. On October 7, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 19, 1992. The petition was filed on December 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, mandates disclosure upon request of a broad range of materials in the possession of federal agencies. The disclosure requirements, however, are subject to a number of exemptions. This case involves Exemption 4, which protects from compelled disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). In *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), the District of Columbia Circuit held that commercial or financial information obtained from a person is "confidential" within the meaning of Exemption 4 "if disclosure of the information is likely * * * (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770.

The Institute for Nuclear Power Operations (INPO) is a private, voluntary organization of nuclear electric utilities. Pet. App. 6a. In order to assist its members in improving their performance, INPO

develops and provides to its members detailed standards, criteria, and guidelines for the construction, operation, maintenance, and support of commercial nuclear power plants. INPO also conducts evaluations of nuclear plants under construction or operated by member utilities and provides specific findings and recommendations to the utilities. INPO's reports are distributed to its members and to the Nuclear Regulatory Commission (NRC), but they are not made available to the public, because INPO believes that public dissemination would make utility personnel reluctant to provide thorough and candid assessments.[1] This case involves INPO reports containing analyses of significant safety-related events occurring in the construction, testing, or operation of specific nuclear plants. The reports are intended to assist in correcting the causes of recurring events and identifying warning signs of more serious potential events.[2]

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[1] INPO distributes the reports to its members and to the NRC based upon the explicit understanding that the recipient will not disclose them to third parties except with INPO's consent. Pet. App. 45a & n.12.

[2] The information in these INPO reports differs markedly from the information in the Licensee Event Reports (LERs) that licensees must submit to the NRC, pursuant to regulation, within 30 days after discovery of a safety-related event. LERs are publicly available from the NRC. See 10 C.F.R. 50.73(a)(1). An NRC official's declaration in this case explained that, while an LER often contains more detailed technical data concerning an event than appears in an INPO report on the same event, the analogous INPO report contains information and analysis not found in an LER, particularly about the performance of the personnel involved. See Rosenthal Decl. ¶¶ 5, 6.

2. In 1984, petitioner submitted a FOIA request for INPO reports in the possession of the NRC. The NRC denied that request on the ground that the reports are protected from disclosure under Exemption 4. Pet. App. 6a. Petitioner then filed this action, and the district court granted summary judgment for the NRC. *Id.* at 36a-41a. Applying the *National Parks* test, the district court held that the reports are confidential because their disclosure would impair the NRC's access to necessary information in the future. See *id.* at 40a-41a.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 42a-64a. The court of appeals found that the reports in question are not customarily released to the public. *Id.* at 49a. It held, however, that the record failed to show whether disclosure would damage the particular interests that, under *National Parks*, justify invocation of Exemption 4. *Id.* at 50a-57a. The court therefore remanded for further evidentiary proceedings on several issues, including (1) whether the NRC would be deprived of the reports in the future if INPO ceased to submit them to the agency voluntarily, and (2) whether the NRC's use of any alternative means of obtaining the reports would pose a significant risk that their quality and usefulness to the NRC would be diminished. *Id.* at 52a, 59a-61a.

4. On remand, the district court permitted INPO to intervene as a defendant and granted summary judgment for the NRC and INPO. Pet. App. 65a-71a. The court noted that "both NRC and INPO share the conviction" that disclosure of the reports would impair the NRC's ability to obtain candid information

and analyses in the future. *Id.* at 70a. The court found it unnecessary to resolve that issue, however, holding instead that the reports satisfied the *National Parks* test because their disclosure would damage the working relationship between the NRC and INPO. The court reasoned that disclosure of the requested reports would require the NRC to employ coercive means to obtain INPO reports in the future. In the court's view, the acrimony and litigation that would attend the NRC's efforts to do so would convert INPO and the agency into "wary allies, working independently of one another, duplicating one another's efforts, and mistrustful of one another's initiatives or overtures." According to the court, that result would, in turn, impair the agency's efficiency and effectiveness. *Id.* at 71a.

5. A panel of the court of appeals again reversed and remanded, concluding that the agency had not established a basis for withholding under *National Parks*. Pet. App. 72a-89a. Although the record included affidavits of NRC officials, INPO officials, utility executives, and independent consultants stating that disclosure would likely cause a qualitative impairment of the reports by discouraging candor on the part of utility employees interviewed in connection with the reports, the panel discounted that evidence as "self-interested speculations by officials of the entities resisting disclosure." *Id.* at 86a. The panel stated that, under *National Parks*, the confidentiality of records must be established by "testimony from working-level employees regarding the importance of confidential treatment of INPO

reports to their willingness to speak to INPO analysts." *Id.* at 85a.

In a concurring opinion, Judge Randolph, joined by Judge Williams, agreed that the result reached by the panel was compelled by circuit precedent. Pet. App. 89a. He concluded, however, that the INPO reports are confidential under the plain meaning of that term, and that *National Parks* had "'fabricated, out of whole cloth' * * * an additional requirement that must be met before confidential information is exempt from disclosure." *Id.* at 88a.

6. At the suggestion of the NRC and INPO, the court of appeals vacated the panel's decision and ordered that the case be reheard en banc. Pet. App. 90a-91a. The NRC and INPO argued that the test announced in *National Parks* is inconsistent with the text and history of Exemption 4, and that *National Parks* should therefore be overruled. Petitioner argued that the *National Parks* test should be retained. No party specifically contended that the application of Exemption 4 to information voluntarily submitted to an agency should be governed by a test different from that applicable to information submitted to the agency under compulsion.[3]

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[3] Petitioner acknowledged that "[a]s an intuitive matter, it might seem sensible to establish a bright-line rule that information obtained voluntarily from a party should always be exempt from disclosure," Critical Mass En Banc C.A. Br. 37, but argued that such a rule should not be adopted, *id.* at 37-39. INPO contended that "[w]ithout at least some assurance that the documents will remain confidential, private parties will be discouraged from voluntarily submitting confidential information—a result that is flatly contrary to the purpose of Exemption 4." INPO En Banc C.A. Br. 27. INPO did not argue,

The en banc court affirmed the judgment of the district court, holding that the requested reports are protected from disclosure under Exemption 4. Pet. App. 1a-33a. The court first concluded that, under the principle of *stare decisis*, the holding in *National Parks* should be reaffirmed, albeit with correction of "some misunderstandings as to its scope and application." *Id.* at 9a. In declining to overrule *National Parks*, the court cited the widespread acceptance of the *National Parks* test by other courts of appeals and Congress's "cognizance" of *National Parks* in the legislative history of several other statutes containing exemptions comparable to Exemption 4 of the FOIA. *Id.* at 11a-12a. The court below also concluded that "*National Parks* has not proven so 'unworkable' in practice as to constitute a 'positive detriment to coherence and consistency in the law' or a 'direct obstacle to the realization of important objectives embodied in other laws.'" *Ibid.* (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989)).

The court of appeals declined, however, to extend *National Parks* to situations where, as here, the requested information was submitted *voluntarily* to

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however, that disclosure of voluntary and compelled submissions should be governed by different legal tests. The NRC's brief discussed the somewhat different question of whether an agency's access to information has been "impaired" within the meaning of *National Parks* if disclosure causes the submitter to cease providing it voluntarily, forcing the agency to rely on coercive means. See NRC En Banc C.A. Br. 26-27; see also *Critical Mass I*, Pet. App. 62a-63a (Buckley, J., concurring in part and dissenting in part); *Critical Mass II*, Pet. App. 89a (Randolph, J., concurring).

the federal agency. Pet. App. 13a-20a. The court explained that when information is submitted to the government under compulsion, its disclosure is unlikely to impair the government's access to similar information in the future; the principal governmental interest is in ensuring the continued reliability of the information. *Id.* at 15a. But when information is submitted voluntarily, the court reasoned, the government's interest in the continued availability of the information is implicated, because "the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation." *Id.* at 16a. The court also noted that, while the *National Parks* test had frequently been applied to information submitted under compulsion, no similar body of law existed with regard to voluntarily submitted records. See *id.* at 18a. The court then concluded:

> Accordingly, while we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

Ibid. Applying that test, the court held that the INPO reports are protected from disclosure by Exemption 4. *Id.* at 19a.[4]

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[4] The court stated: "[W]e agree with the district court's conclusion that the information [the INPO reports] contain is commercial in nature; that the reports are provided to the

ARGUMENT

Although the proper standard for determining whether information is "confidential" within the meaning of Exemption 4 might someday merit this Court's consideration, further review of the present case is unwarranted. First, the decision below, sustaining the NRC's withholding of the INPO reports, is correct. The D.C. Circuit's application of Exemption 4 to cases involving voluntarily submitted information is consistent with the plain language of the exemption and the interests that it is designed to protect, and it correctly recognizes that mandatory public disclosure of such information is particularly likely to impair the government's ability to obtain similar submissions in the future. For that reason, although the en banc court's disposition rendered it unnecessary to reach the issue, the INPO reports were properly withheld even under the *National Parks* test that petitioner urges.

Second, there is no conflict among the courts of appeals that requires the Court's attention at this time. The distinction drawn by the D.C. Circuit between voluntarily and involuntarily submitted information has not been adopted or rejected by any other court of appeals because it has not been considered by any other court of appeals; until it can be determined whether other courts will find the D.C. Circuit's analysis persuasive, review by this Court

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NRC on a voluntary basis; and that INPO does not customarily release such information to the public. On the basis of these findings, we hold that the INPO reports are confidential within the meaning of Exemption 4 and therefore protected from disclosure." Pet. App. 19a (citations omitted).

would be premature. For much the same reason, petitioner's speculation that the D.C. Circuit's rule concerning voluntarily submitted information may present practical difficulties in the future does not furnish a basis for disturbing the court of appeals' disposition of this nine-year-old FOIA case.

1.a. The en banc court of appeals held that financial or commercial information voluntarily submitted to a federal agency is "confidential" within the meaning of Exemption 4 "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Pet. App. 18a. That test is fully consistent with the language and the legislative history of the FOIA. According to Webster's first definition, information is "confidential" if it is "communicated, conveyed, acted on, or practiced in confidence: known only to a limited few: not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). See also *The Random House Dictionary of the English Language (Second Edition)* 428 (1987) (defining "confidential" as, *inter alia*, "limited to persons authorized to use information, documents, etc., so classified"); *Critical Mass II*, Pet. App. 88a (Randolph, J., concurring).

The legislative history of the FOIA both confirms that Congress intended the word "confidential" in Exemption 4 to have its usual meaning and supports the court of appeals' formulation. Thus, the Senate Report states:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries but which would customarily not be

> released to the public by the person from whom it was obtained.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The House Report similarly state:

> This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through materials submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (footnote omitted). Petitioner makes no attempt to demonstrate that the en banc court's test for the confidentiality of voluntarily submitted information is inconsistent with the statutory language. Nor does petitioner identify any legislative history suggesting that Congress intended the language to have some other meaning.

b. A separate question is presented by the en banc court's reaffirmation—technically in dicta—of the further showing *National Parks* required for withholding commercial or financial information that was submitted to a federal agency under compulsion —namely, that disclosure would be likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770 (footnote omitted). The D.C. Circuit in *National Parks* did not purport to draw upon ordinary

meanings of the word "confidential" in formulating that standard; it instead ruled that invocation of Exemption 4 is appropriate only if "non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767. In urging below that *National Parks* be overruled, we contended that the D.C. Circuit had erred in that case in imposing this additional, extra-textual requirement, and the en banc court below in fact refrained from stating that *National Parks* had been correctly decided. It chose to adhere to *National Parks* only as a matter of *stare decisis*. See Pet. App. 9a-13a; see also *id.* at 21a-24a (Randolph, J., joined by Silberman & Sentelle, JJ., concurring) (expressing the view that *National Parks* was wrongly decided but agreeing that the case should not be overruled).

This aspect of the en banc court's opinion does not warrant further review. Even if the continued applicability of *National Parks* to information submitted to the agency under compulsion were otherwise suitable for this Court's consideration, the present case would be an inappropriate vehicle for resolving that issue, since there can be no serious question that the requested INPO reports were voluntarily submitted to the NRC.[5] Not surprisingly, moreover, petitioner does not ask the Court to grant certiorari for the purpose of holding that the D.C.

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[5] Petitioner acknowledges (Pet. 20 n.5) that "the information on the INPO system is submitted voluntarily." Similarly, the dissenters on the en banc court did not suggest that INPO's submission of the reports to the NRC was involuntary. See Pet. App. 25a-33a.

Circuit erred in declining to overrule *National Parks*.[6]

c. The en banc court below was on solid ground, however, in declining to extend the *National Parks* test to information submitted voluntarily to a federal agency. Although the *National Parks* test has been applied repeatedly by the D.C. Circuit and has been adopted by other courts of appeals, petitioner has identified only one appellate decision in which that test was applied to information submitted to the agency on a voluntary basis. See Pet. 13-14 (citing *9 to 5 Organization for Women Office Workers* v. *Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983)). Nor had the D.C. Circuit itself applied the *National Parks* test to voluntarily submit information prior to the instant dispute.[7]

The en banc court was also correct in concluding that compelled disclosure of voluntarily submitted information is particularly likely to impair the government's access to similar information in the future. When information is submitted to the government under compulsion, there is little danger that disclosure of the information to third parties pursuant to the FOIA will hinder the government's

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[6] If this Court were to grant review, we of course would be entitled to argue, in support of the judgment below, that the Court should not approve the *National Parks* test for *any* information withheld under Exemption 4, whether it was submitted to the agency voluntarily or under compulsion.

[7] See Pet. App. 18a ("we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently" under the test announced by the en banc court).

efforts to obtain similar information at a later date. The primary governmental interest in that context is in ensuring the continued reliability of the information. See Pet. App. 15a. But when information is provided to the government voluntarily, the "presumption" is that the government's interest in the continued availability of the information will likewise be threatened by disclosure, "as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation." *Id.* at 16a.[8] We may assume that persons who have voluntarily submitted information with the understanding that it will not be disseminated to third parties will *sometimes* continue to submit similar information even after that understanding has been breached. But the en banc court correctly determined that the likelihood of such conduct is sufficiently slight—and the importance of workable rules sufficiently great, see *id.* at 17a (citing *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 779 (1989))—that a categorical rule is justified in cases involving voluntarily submitted information that the submitter does not customarily make public.

2. Petitioner contends (Pet. 14) that the decision below conflicts with the First Circuit's decade-old decision in *9 to 5 Organization for Women Office Workers*. Petitioner points out (Pet. 18) that the

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[8] See also Pet. App. 18a ("It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release.").

information at issue in *9 to 5* was voluntarily submitted but that the First Circuit nevertheless remanded to the district court for application of the *National Parks* test. Petitioner appears to be correct that the First Circuit's disposition of *9 to 5* would have been different if it had adopted the legal standard applied by the en banc court in the present case. That different disposition in *9 to 5*, however, does not warrant review in this case.

The First Circuit in *9 to 5* did not consider the contention that a standard other than the traditional *National Parks* test should apply because the information in question was submitted to the federal agency on a voluntary basis. Indeed, although it seems clear that the information at issue in *9 to 5* was submitted voluntarily, the court's opinion does not even mention that fact. If the First Circuit is squarely presented with the question in the future, it is entirely possible that it will adopt the D.C. Circuit's approach with respect to voluntarily submitted records. In any event, review of that issue by this Court at the present time would be premature. After other courts of appeals have had an opportunity to consider the analysis adopted by the D.C. Circuit in the present case, this Court will be better able to determine whether the issue warrants review.

3. Petitioner speculates that the distinction between voluntary and mandatory submissions will be difficult to apply (Pet. 14-19); that it will lead federal agencies to arrange for voluntary submission of information so as to thwart the purposes of the FOIA (Pet. 19-21); and that the decision below may have deleterious consequences as applied to reverse-FOIA

actions (Pet. 23-25).[9] Such speculation about future developments scarcely furnishes a basis for review by this Court now. The accuracy of petitioner's predictions simply cannot be determined until the lower courts have acquired greater experience in applying the en banc court's analysis. In light of the paucity of judicial experience in applying the *Critical Mass* analysis in subsequent cases—an experience thus far confined to the district courts[10]—review at the present time would be premature.

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[9] Petitioner also challenges in passing the court of appeals' conclusion that the INPO reports at issue here constitute "commercial" information within the meaning of Exemption 4. See Pet. 23. That holding, first announced in the initial panel opinion and subsequently reaffirmed by the en banc court, see Pet. App. 46a-47a, 19a, is fact-specific, does not conflict with the decision of any other court of appeals, and does not warrant review by this Court. We would urge the Court to deny review on that issue even if it were to grant certiorari on whether the information is "confidential," since if the Court were to hold that the INPO reports do not constitute "commercial" information, the broader issue of confidentiality would remain unresolved.

[10] We are aware of five district court decisions involving the application of *Critical Mass*. See *Cohen, Dunn & Sinclair, P.C.* v. *GSA*, Civ. Action No. 92-0057-A (E.D. Va. Sept. 10, 1992); *Allnet Communication Services, Inc.* v. *FCC*, 800 F. Supp. 984 (D.D.C. 1992); *Environmental Technology, Inc.* v. *EPA*, Civ. Action No. 3:92CV363 (E.D. Va. Jan. 21, 1993); *McDonnell Douglas Corporation* v. *Rice*, Civ. Action No. 92-2211(JHG) (D.D.C. Sept. 30, 1992), motion for reconsideration pending; *Harrison* v. *Lujan*, Civ. Action Nos. 90-1512 & 91-0250 (D.D.C. Dec. 8, 1992). There are as yet no court of appeals decisions applying the standard announced by the en banc court.

In assessing the practicability of the en banc court's approach, moreover, it should be borne in mind that the *National Parks* test itself hardly furnishes the sort of bright-line rule that petitioner believes is appropriate. That test requires an inherently speculative determination as to the likely future interaction between a federal agency and private parties in the event that specified records are held to be subject to mandatory disclosure under the FOIA. The present case illustrates the imprecision of that inquiry: had the court of appeals denied rehearing en banc, the case would have been remanded to the district court for a *third* round of evidentiary proceedings.[11] Insofar as ease of application is relevant in fashioning an appropriate test for determining confidentiality, the standard announced by the en banc court with respect to voluntarily submitted records facilitates rather than hinders the implementation of Exemption 4.[12]

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[11] Application of the *National Parks* test will sometimes involve speculation not simply about the relationship between the government and the submitter, but also about the relationship between the submitter and other private parties. In *Critical Mass II*, for example, the panel remanded for further proceedings to determine whether disclosure of INPO reports would lessen the candor with which utility employees respond to questions posed by INPO personnel. See Pet. App. 85a-87a.

[12] This case need not be held for *United States Department of Justice* v. *Landano*, No. 91-2054 (to be argued Feb. 24, 1993). That case involves Exemption 7(D) of the FOIA, 5 U.S.C. 552(b)(7)(D), which permits the withholding of law enforcement information that "could reasonably be expected to disclose the identity of a confidential source." Although both Exemption 4 and Exemption 7(D) use the word "confidential,"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the two Exemptions deal with different problems and, to date, the courts' analyses of the two Exemptions have proceeded on different tracks. See also *Landano* Pet. Reply Br. 10-11 n.7.

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No. 92-1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT INSTITUTE OF NUCLEAR POWER OPERATIONS

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QUESTIONS PRESENTED

1. Are confidential reports on events at commercial nuclear power plants exempt from public release under Exemption 4 of the Freedom of Information Act, when the reports are given to the Nuclear Regulatory Commission voluntarily?

2. Was summary judgment for Respondents appropriate under Fed. R. Civ. P. 56 and this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), where Petitioner failed to controvert the extensive, detailed evidentiary record created by Respondents in support of their motions for summary judgment?

RULE 29.1 STATEMENT

Respondent Institute of Nuclear Power Operations is a non-stock, non-profit corporation organized under the laws of Delaware. It has no parent or subsidiary company.

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BRIEF IN OPPOSITION OF RESPONDENT INSTITUTE OF NUCLEAR POWER OPERATIONS

JURISDICTION

Petitioner Critical Mass Energy Project ("Critical Mass") invokes the jurisdiction of this Court under 28 U.S.C.A. sec. 1254(1) (West 1966 & Supp. 1992). The judgment of the Court of Appeals on rehearing *en banc* was entered on August 21, 1992. On October 7, 1992, the

Chief Justice granted the request of Critical Mass for an extension of time within which to file a petition for certiorari until December 19, 1992. On January 15, 1993, the Court granted the request of the United States for an extension of time within which to respond to the Petition until February 19, 1993.

RULE OF PROCEDURE

Federal Rule of Civil Procedure 56(e) provides in relevant part as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

STATEMENT OF THE CASE

Because Petitioner's Statement of the Case is inaccurate in several respects and contains various assertions that are not supported by the record, and also because the legal issue here is highly fact-bound, Respondent Institute of Nuclear Power Operations ("INPO") submits the following Statement of the Case:

1. *INPO And The "SEE-IN" Reports*

INPO is a Delaware non-profit, non-stock corporation with its only place of business in Atlanta, Georgia. It was organized by the commercial nuclear electric utility industry in 1979 following the accident at Three Mile Island. The sole mission of INPO since its formation has been to promote the highest levels of safety and reliability —to promote excellence—in the operation of commercial nuclear power plants. INPO has no other function. In particular, INPO does not engage in public relations, lobbying, or litigation to promote nuclear power. J.A. 166

(Exhibit A to Affidavit of Angelina S. Howard, Vice President of INPO ("Howard Affidavit")).[1]

The Members of INPO are all electric utilities and other organizations that have direct responsibility and legal authority to operate commercial nuclear power plants in the United States. *Id.* at 159. Membership in INPO is voluntary. The companies that constructed the nuclear steam supply systems used in commercial nuclear plants, and other companies with major responsibility for the design and construction of these plants, are Supplier Participants in INPO. *Id.* at 164.

To carry out its mission of promoting safety and reliability, INPO administers several major programs, which are described at J.A. 162-217. One of those programs is known by the acronym "SEE-IN," which stands for "Significant Event Evaluation & Information Network." SEE-IN was designed to help correct one of the root causes of the accident at Three Mile Island, which was the absence of any system to communicate the lessons learned from significant events at any one nuclear plant to all of INPO's Members.[2]

The SEE-IN program functions through teams of engineers and other technical specialists at INPO, who collect operating experience information from all commercial nuclear power plants, both in the United States and

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[1] In this Brief in Opposition, citations to "J.A." refer to the Joint Appendix filed in the Court of Appeals on rehearing *en banc*.

[2] President Carter's Commission on the Accident at Three Mile Island (usually known as the Kemeny Commission) recommended that the industry establish "a systematic gathering, review, and analysis of operating experience at all nuclear power plants coupled with an industry-wide international communications network to facilitate the speedy flow of this information to affected parties." President's Commission on the Accident at Three Mile Island, *The Need For Change: The Legacy of TMI* at 68 (1979). Although SEE-IN was not a direct response to the Kemeny Commission recommendation, it is consistent with it.

abroad and analyze that information with a view to learning lessons important for the safe operation of those plants. These lessons learned are then communicated back to the men and women who operate the plants through a computerized worldwide communications network. J.A. 279-80 (Affidavit of Terence J. Sullivan, Vice President of INPO ("Sullivan Affidavit")); J.A. 150 (Howard Affidavit).

SEE-IN focuses on "significant events" in plant operations—that is, events that are significant because they offer lessons that can be learned to improve safety and reliability in the commercial generation of electricity through the application of nuclear power. J.A. 361-62 (Supplemental Affidavit of Terence J. Sullivan ("Sullivan Supp. Affidavit")); J.A. 149-50 (Howard Affidavit). In the early 1980s, INPO prepared two principal types of SEE-IN reports that are at issue in this case: Significant Event Reports ("SERs") dealt with a single significant event at a single nuclear power unit. Significant Operating Experience Reports ("SOERs") dealt with similar events, usually at several nuclear power units, which INPO concluded shared a common theme or offered similar lessons for plant safety and reliability. J.A. 280 (Sullivan Affidavit); J.A. 360-61 (Sullivan Supp. Affidavit). The SOERs contain recommendations for corrective action to be taken at nuclear plants, if appropriate. J.A. 188-89 (Howard Affidavit).

INPO carefully controls the distribution of SEE-IN reports pursuant to a formal, written policy statement. J.A. 151, 224-30 (Howard Affidavit). The SEE-IN reports at issue in this case were distributed to the Members and Supplier Participants in INPO, certain International Participants in INPO, the Nuclear Safety Analysis Center (another industry safety organization), and one captive nuclear insurance carrier owned by utilities. *Id.* at 151. These parties receive the SEE-IN reports on the explicit understanding that the reports would

be held in strict confidence. *Id.* INPO permits its Members to disclose a SEE-IN report to an outside party with whom the Member has engaged to assist in responding to the report. Finally, where a SEE-IN report discusses a product, INPO offers the vendor of that product an opportunity to review and comment on a draft of the report. *Id.*; Pet. App. 45a n.12.[3] Critical Mass states, without citation to the record, that SEE-IN reports are "shared with everyone in the nuclear industry." Petition 4. This claim is incorrect.

2. *The Voluntary Submission Of The SEE-IN Reports To The NRC*

At each stage of this lawsuit since 1988, when INPO first became a party, INPO has vigorously asserted that the SEE-IN reports at issue here were given voluntarily to the NRC and should for that reason be exempt from disclosure. Statement of Material Facts in Support of Motion of Summary Judgment of INPO at 13 (D.D.C. Oct. 18, 1988); Brief of Appellee INPO at 11 (D.C. Cir., Feb. 8, 1991); *En Banc* Brief of Appellee INPO at 21 (D.C. Cir., Nov. 13, 1991). The statements to the contrary in the Petition are incorrect. Petition 9, 13-14.

INPO is not licensed or regulated by the NRC. INPO does not prepare SEE-IN reports to comply with any NRC regulation. INPO has no formal agreements with its Members that obligate them to provide INPO with information on significant events or to make the personnel in their commercial nuclear plants available for interviews by INPO. J.A. 361-62 (Sullivan Supp. Affidavit).

INPO voluntarily delivers SEE-IN reports to the NRC pursuant to a written agreement that the NRC will hold these reports in confidence. J.A. 151, 237-42 (Howard Affidavit); J.A. 103, 121-29 (Declaration of Joseph Felton, Director of Rules and Records, NRC). The agreement

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[3] Citations to "Pet. App." refer to the Appendix to the Petition for Writ of Certiorari.

further states that the NRC does not take regulatory action against INPO's Members or their employees based solely on information the NRC learns through SEE-IN reports. *Id.* at 361-62 (Sullivan Supp. Affidavit). INPO has repeatedly stated in the course of this litigation, both directly and through its counsel, that, in the event the NRC is obligated to disclose the SEE-IN reports at issue here, INPO would no longer deliver these reports to the NRC and would vigorously resist any attempt by the NRC to obtain these reports. J.A. 282-83 (Sullivan Affidavit); Brief of Appellee INPO at 18-19 (D.C. Cir., Feb. 8, 1991).

In its Petition, Critical Mass implies that SEE-IN is a response to the NRC's Three Mile Island Action Plan, and that "it would be prohibitively expensive for every nuclear plant to develop its own procedures for monitoring all safety information in the industry." Petition 3. There is nothing in the record to support these claims, and Critical Mass provides no citation to the record. It should be noted that SEE-IN was started as an industry-wide initiative well before the NRC adopted the Three Mile Island Action Plan. J.A. 184 (Howard Affidavit); 48 Fed. Reg. 33858 (July 26, 1983). Critical Mass also states that the NRC uses INPO's SEE-IN reports to "make sure that licensees are in fact making their employees aware of new safety information," Petition 3, and "to verify the completeness and accuracy of the descriptions of safety-related 'events' at nuclear power plants in the publicly disclosed [Licensee Event Reports]." *Id.* at 21. Again, there is nothing in the record to support these claims, and Critical Mass provides no citation to the record. Although most events discussed in SEE-IN reports have already been the subject of Licensee Event Reports, J.A. 281-82 (Sullivan Affidavit), there are relatively few SEE-IN reports compared to a large number of Licensee Event Reports. (The ratio is on the order of one SEE-IN report to 150 Licensee Event Reports.) Thus, even if they were used as Critical Mass claims,

SEE-IN reports could not provide a reliable check on more than a small percentage of Licensee Event Reports.

3. *The FOIA Request And The NRC's Response*

In 1984, Critical Mass submitted a request to the NRC under the Freedom of Information Act, 5 U.S.C.A. sec. 552 (West 1977), seeking release of "any and all documents received by [the NRC] from the Institute of Nuclear Power Operations." J.A. 104, 130-33 (Felton Declaration). During the next few months, the NRC released to Critical Mass many INPO documents and correspondence. *Id.* at 104. The NRC sought the views of INPO prior to the release of these documents and INPO reluctantly agreed to the release of these documents. *Id.* at 237-42 (Howard Affidavit).

The NRC, however, refused to release any INPO SEE-IN reports on the ground that these "documents, in whole or in part, contain[] confidential business (proprietary) information." J.A. 104 (Felton Declaration) (citing 5 U.S.C. sec. 552(b)(4) ("Exemption 4")). The reports withheld by the NRC are 270 SERs from the years 1981 through 1983, and 47 SOERs from the years 1980 through 1983. (The NRC also withheld 56 Operations & Maintenance Reminders, which are another type of SEE-IN report.) *See* Felton Declaration, Exhibit H. It is these reports that are at issue in this case.

4. *The Holdings In* Critical Mass I

Critical Mass filed this lawsuit in 1984. (INPO did not become a party until 1988.) The district court (Thomas Penfield Jackson, J.) granted summary judgment in favor of the NRC. The district court found that the SEE-IN reports were confidential commercial information and hence exempt from disclosure under Exemption 4. Pet. App. 38a ("[T]he INPO reports must be deemed to be 'commercial' information in all relevant senses of the word.") The court's ruling was made under

the "likely impairment" prong of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

On appeal, a divided panel of the D.C. Circuit in *Critical Mass I* affirmed on two important points: First, it held that the SEE-IN reports were "commercial . . . information" within the meaning of Exemption 4. Pet. App. at 46a. Second, it held that the SEE-IN reports were "confidential" since they "would customarily not be released to the public by the person from whom [they were] obtained." *Id.* at 47a-48a.

The court, however, remanded on the "likely impairment" prong of National Parks. It held that the NRC must provide a "detailed justification" for the conclusion that obtaining the SEE-IN reports by some means other than voluntary submission by INPO would entail a significant risk that the value of the submitted reports would decrease. *Id.* at 54a. It also required that the decrease in the value of the reports must be "significant enough to justify withholding the information." *Id.* at 57a.

Judge Buckley concurred in the panel's holdings that the SEE-IN reports were commercial information, and that these reports were confidential, but he dissented from the remand. He would have held that the "likely impairment" prong of *National Parks* was inapplicable to information that is voluntarily submitted to the Government, and therefore that the SEE-IN reports should be within the scope of Exemption 4. *Id.* at 62a-64a.

5. *The Evidence On Remand From* Critical Mass I

Because *Critical Mass I* appeared to raise complex evidentiary issues, INPO reluctantly came to the conclusion that it must intervene in this lawsuit. (As noted above, INPO does not engage in any public activities to promote commercial nuclear power.) The district court granted INPO's motion to intervene in September 1988. J.A. 6.

At Critical Mass' request, INPO made one of its Vice Presidents, Terence J. Sullivan, available for a deposition in Washington, D.C. Dr. Sullivan, who has been employed by INPO since 1982, holds a doctorate in nuclear engineering and has extensive experience in commercial nuclear power plants. J.A. 277-78 (Sullivan Affidavit). Counsel for Critical Mass cross-examined Dr. Sullivan for longer than three hours. F.J.A. 380, 534.[4]

All parties filed cross-motions for summary judgment. INPO supported its motion with five affidavits from witnesses the district court characterized as "highly qualified." Pet. App. 68a. INPO's affidavits were from the following experts:

A. R. P. McDonald, an experienced nuclear utility manager. J.A. 267. Mr. McDonald assisted in designing the SEE-IN program. Based on his experience working in commercial nuclear power plants, he expressed the opinion that public disclosure of the SEE-IN reports at issue here would decrease the quality of the interactions between INPO and nuclear plant personnel.

B. Adm. Donald D. Engen, a former Administrator of the Federal Aviation Administration. F.J.A. 188. Adm. Engen expressed the opinion, based on his experience with aviation safety, that confidentiality contributes to fuller safety reporting. He applied this opinion to the SEE-IN reports at issue here, with the conclusion that disclosure of the reports would hinder the flow of information to INPO.

C. Charles O. Miller, a recognized expert in industrial safety. F.J.A. 273. Mr. Miller stated that preserving the confidentiality of the SEE-IN reports at issue here was consistent with established principles of industrial psychology.

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[4] Citations to "F.J.A." refer to the Joint Appendix in *Critical Mass II*, which was filed in the Court of Appeals on January 24, 1991.

D. Dr. Sullivan, Vice President of INPO. J.A. 277 and 357. Dr. Sullivan stated that INPO, in preparing SEE-IN reports, relied on the subjective perspectives and self-criticism of nuclear plant employees, and he offered concrete examples of this reliance. *Id.* at 363-66. Based on his experience working in commercial nuclear power plants, he expressed the opinion that public disclosure of the SEE-IN reports at issue here would discourage those employees from offering their subjective views to INPO, which in turn would hinder INPO in its analysis.

E. Ms. Howard, Vice President of INPO. J.A. 147. Ms. Howard, who has been employed by INPO since 1980 and who has extensive experience in the commercial nuclear power industry, is responsible for controlling the distribution of SEE-IN reports. She describes the formal, written INPO policy designed to preserve the confidentiality of SEE-IN reports.

Critical Mass claims that INPO "never submitted" evidence from nuclear plant employees. Petition 7. This is incorrect. Mr. McDonald has worked in commercial nuclear plants for years, J.A. 268, and Dr. Sullivan has extensive experience working in commercial nuclear plants. J.A. 278.

As the district court stated, Critical Mass "offer[ed] no affirmative evidence of its own to contradict defendants' declarants and affiants." Pet. App. 69a. In particular, Critical Mass, having cross-examined Dr. Sullivan of INPO, then never relied on his testimony. Critical Mass did submit two affidavits, Affidavit of Michael Mariotte (Dec. 22, 1988) ("Mariotte Affidavit") and Affidavit of Kenneth Boley (Dec. 22, 1988) ("Boley Affidavit"), which total less than three pages, but neither of these affidavits controverts the evidence submitted by INPO in support of its motion. So far as the affidavits reveal, neither of Critical Mass' affiants has any training, experi-

ence, or education in the field of commercial nuclear power.

In its Petition, Critical Mass claims that Licensee Event Reports, which the NRC requires licensees to submit pursuant to a detailed regulation, and which are generally available to the public, "will inevitably become more and more sketchy, revealing less to the public about the important issue of safety at nuclear power plants." Petition 21. There is no support in the record for this claim, and Critical Mass does not provide any citation to the record. Moreover, the NRC regulations governing Licensee Event Reports set forth with detail the required contents of each report, and specifically provide that the report must include a "clear, specific, narrative description of what occurred," as well as a description of the cause of the error or failure, and of "any corrective actions planned as a result of the event." 10 C.F.R. sec. 50.73(b) (1992). The regulations further allow the NRC to require submission of supplemental information if necessary for the agency's "complete understanding" of the event at issue. *Id.* sec. 50.73(c).

It is important to note that, in the district court after remand from *Critical Mass I*, Critical Mass had a full and fair opportunity to develop a record in support of its position. Indeed, INPO, pursuant to a protective order, permitted counsel for Critical Mass to have access to selected SEE-IN reports for the purpose of testing INPO's contentions. J.A. 358-66 (Sullivan Supp. Affidavit).

6. Critical Mass II *And The* En Banc *Decision*

Critical Mass appealed. INPO argued to the panel, *inter alia*, that the "likely impairment" prong of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), should be rejected in favor of a "plain meaning" interpretation of Exemption 4, relying on this Court's decisions in such cases as *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), and *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1387 (1990). Brief of Appellee INPO at 21-23 (D.C. Cir., Feb. 8, 1991). INPO emphasized that the SEE-IN reports were provided voluntarily to the NRC. *Id.* at 12-13.

The panel in *Critical Mass II* reversed and remanded. Pet. App. 87a. It held that summary judgment was inappropriate because INPO and the NRC failed to meet the "likely impairment" test to the panel's satisfaction, although the articulation of that test in *Critical Mass II* differed in significant respects from that given in *Critical Mass I*. Judge Randolph, joined by Judge Williams, concurred. Judge Randolph questioned the statutory basis of the "likely impairment" test, but he recognized that the panel could not overrule *National Parks*. Pet. App. 88a-89a.

INPO and the NRC suggested rehearing *en banc*, which the court granted and vacated the panel decision in *Critical Mass II*. On rehearing *en banc*, INPO again emphasized that the SEE-IN reports were submitted to the NRC voluntarily. *En Banc* Brief of Appellee INPO at 21 (D.C. Cir., Nov. 13, 1991).

The court *en banc*, in an opinion written by Judge Buckley, adopted the reasoning of Judge Buckley's concurring and dissenting opinion in *Critical Mass I*, written five years earlier. The court found that the SEE-IN reports were commercial information that INPO treated as "confidential" in the sense that INPO did not "customarily" release these reports to the public. The court held that the reports were within Exemption 4 because they were submitted on a voluntary basis, and it confined the "likely impairment" test of *National Parks* to situations where (as in *National Parks* itself) the information was required to be submitted to the Government. Pet. App. 18a. Judge Buckley was careful to note that "we do not repudiate any part of our holding" in *National*

Parks. *Id.* Furthermore, he stated that "we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently had this test been applied." *Id.*

Judge Randolph, joined by Judges Silberman and Sentelle, concurred to explain that respect for *stare decisis* precluded an outright rejection of *National Parks*. Judge Ruth Bader Ginsburg, joined by Chief Judge Mikva and Judges Wald and Edwards, dissented. Judge Ginsburg would have applied the "likely impairment" test of *National Parks* to information voluntarily submitted to the Government.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

A. No other circuit, as of the date of this Brief, has had an opportunity to consider the decision below. The D.C. Circuit did not repudiate any aspect of *National Parks*. The question Critical Mass seeks to raise is fact-bound. Critical Mass points to a single decision by another circuit that it claims *might* have been decided differently under the *en banc* decision below.

B. The focus of Petitioner's argument is a "parade of horribles" that, according to Petitioner, is likely to follow the decision below. Even if Petitioner's predictions were reasonable, which they are not, this Court should first allow these questions to percolate in the lower federal courts. If Petitioner's parade actually happens, then this Court could review an appropriate case arising on actual, rather than predicted, facts.

C. The Exemption 4 issue here is tied together with a complex summary judgment issue under Fed. R. Civ. P. 56, as interpreted by this Court in *Celotex*. Summary judgment was appropriate because Petitioner submitted no evidence to controvert the extensive record marshalled by Respondents. The question raised by the lopsided

record would preclude this Court from considering the Exemption 4 issue in a clean, stand-alone context.

REASONS FOR DENYING THE WRIT

A. As of the date of this Brief in Opposition (February 19, 1993), counsel for Respondent INPO knows of no case decided by any Circuit that considers the *en banc* decision below.

The D.C. Circuit, *en banc*, held that "financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Pet. App. 18a. Judge Buckley, writing for the majority below, stated that "we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently had this test been applied." *Id.*

Judge Ruth Bader Ginsburg, in a dissent joined by Judges Wald, Mikva, and Edwards, noted that "[t]he fact is, we have had *rather few cases* concerning voluntarily submitted information." *Id.* 29a n.4 (emphasis added). Although Judge Ginsburg went on to predict more cases involving voluntarily submitted information, *id.*, the unusual issue of voluntarily submitted information is surely *not* "an important question of federal law [that should be settled] by this Court." Rules of the U.S. Supreme Court 10.1(c).

Judge Buckley, writing for the majority below, made clear that "in defining the limits of the *National Parks* confidentiality test, we do not repudiate any part of our holding in that case." Pet. App. 18a. Thus, to the extent Critical Mass suggests the D.C. Circuit *en banc* has overruled *National Parks*, it is in error. *See* Petition 13, 19. Because *National Parks* involved information that private parties were *required* to submit to the Government, that

case was not, and could not be, dispositive with respect to information submitted voluntarily. The real issue is whether *National Parks* should be extended to apply to information that is submitted to the Government voluntarily, as in this case.

Critical Mass admits, as it must, that under *National Parks* "it was *well established* that if the Government had no ability to compel submission of necessary information, or if the process of compelling it would be overly burdensome, then the information would be exempt from disclosure." Petition 18-19 (emphasis added). Thus, Critical Mass accepts that the voluntary character of a submission should often be *dispositive* of the question of disclosure under Exemption 4. The *en banc* decision below is entirely consistent with this "well established" principle.

Critical Mass has struggled since the start of this protracted lawsuit to show that the NRC supposedly had the statutory authority to obtain the reports from INPO's members, and therefore INPO's submission of the reports to the NRC could not be voluntary. Only one other case, *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990), *appeal dismissed by agreement*, No. 91-5023 (D.C. Cir. July 2, 1992),[5] appears to have raised an analogous issue, and, just as here, this issue in *Teich* was highly fact-bound. (Although Critical Mass cites a second district court decision, *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the United States*, 464 F. Supp. 804, 808-09 (D.D.C. 1979), Petition 18, the information at issue there was "required as a general practice" by the agency, and so *Comstock* is a different case.)

Critical Mass points to only a single circuit court decision that it claims *might* have been decided differently

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[5] The suggestion in the dissenting opinion below that the *National Parks* test may have discouraged defendants in *Teich* from taking an appeal, Pet. App. 29a n.4, is in error, since defendants did appeal, although the case later became moot.

under the *en banc* decision below: *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983). Petition 14. There the First Circuit refused to affirm summary judgment in favor of the Federal Reserve even though that agency had no authority to compel the private parties to provide the information. *9 to 5*, however, was plainly wrong in Critical Mass' view, because Critical Mass asserts that it is "well established" that information is exempt where the agency "had no ability to compel submission" of the information. Petition 18-19. Thus, according to Critical Mass, the information in *9 to 5* should have been exempt from disclosure under Exemption 4. Apparently, Critical Mass believes there is a conflict between the *en banc* decision below and *9 to 5* but neither was correctly decided.

This case presents a rare and fact-bound issue that has little significance for federal law. Since there is no conflict among the circuit courts, this issue should not now be reviewed by this Court.

B. Critical Mass argues that this case warrants review because the ruling below, Critical Mass claims, will be difficult to apply and will encourage Government agencies to avoid disclosure of information obtained from private parties. Petition 14-22. This is a classic "parade of horribles" argument, which is unpersuasive. INPO denies that any of Critical Mass' horribles will come to pass, but this Court will still be sitting if they do.

Critical Mass predicts that the rule adopted below will "create the greatest confusion in the area of government contracts," Petition 16, but that prediction certainly counsels *against* reviewing this case, which arises in the context of the regulation of commercial nuclear power. Even if Critical Mass were right in predicting confusion, which it is not, the best course is to allow this issue to percolate in the lower federal courts before this Court takes it under consideration.

While Critical Mass claims that the rule adopted by the *en banc* court below is unworkable, it nowhere mentions the near impossibility of understanding or applying the "likely impairment" test of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). That test calls for the defendant to provide a "detailed justification," *Pacific Architects & Engineers v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974), showing that in the future, under facts different from those existing at present, the information available to the Government would suffer a "significant impairment." This test is so open-textured that neither the parties nor the district court can have any reasonable sense of what evidence can satisfy this test. Indeed, the only thing that can be said in favor of the "likely impairment" test is that cases calling for its application arise infrequently. Certainly the criteria of clarity and ease of application do not *favor* the "likely impairment" test over the rule adopted by the *en banc* court below.

Critical Mass also claims that Government agencies will be encouraged to "act in conflict with the objectives of the FOIA . . . by agreeing to accept information on a 'voluntary' basis." Petition 20. Critical Mass, of course, cannot suggest that the *National Parks* test has any footing in the statutory language of Exemption 4—as Judge Randolph suggested in his concurring opinion in *Critical Mass II*, this test was made "out of whole cloth." Pet. App. 88a. Since the decision by the *en banc* court below certainly respects the statutory language to a greater degree than does *National Parks*, it would be peculiar if *National Parks* did a better job of following the "objectives" of the FOIA.

Critical Mass' "parade of horribles" argument does not justify granting the writ of certiorari.

C. This case raises a difficult and fact-bound issue under Fed. R. Civ. P. 56 in light of this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If this

Court granted certiorari, and reached any result other than to affirm the judgment below, this summary judgment issue would have to be decided either by this Court or by the court below on remand. The presence of this summary judgment issue makes this case an inappropriate vehicle for review by this Court.

On remand from *Critical Mass I*, the district court decided this case on cross-motions for summary judgment. INPO and the NRC submitted extensive affidavits from witnesses the district court characterized as "highly qualified nuclear professionals possessing both years of relevant experience and the responsibility of currently relevant office." Pet. App. 68a. At Critical Mass' request, INPO made its Vice President, Terence J. Sullivan, available for a sworn deposition in which counsel for Critical Mass cross-examined him for longer than three hours. F.J.A. 380, 535. (Dr. Sullivan, who has been employed by INPO since 1982, holds a doctorate in nuclear engineering and has extensive experience in commercial nuclear power plants. J.A. 277-78.) INPO, in support of its motion for summary judgment, relied heavily upon the transcript of Dr. Sullivan's deposition. Statement of Material Facts in Support of Motion for Summary Judgment of INPO (D.D.C. Oct. 18, 1988).

In contrast to the evidence marshalled by INPO and the NRC, Critical Mass, as the district court stated, "offer[ed] no affirmative evidence of its own to contradict defendants' declarants and affiants." Pet. App. 69a. Having cross-examined Dr. Sullivan under oath, Critical Mass then never relied on any of his testimony. The sum of all Critical Mass' evidence was two affidavits, which together are less than three pages in length. Mariotte Affidavit; Boley Affidavit. So far as is revealed in the affidavits, neither of the affiants for Critical Mass appear to possess any qualifications, training, or experience in the nuclear field. Most important, neither of the affiants for Critical Mass controverted any of the extensive evidence presented by INPO and the NRC.

In light of this lopsided record, INPO argued to the panel in *Critical Mass II*, Brief of Appellee INPO at 17, 23 (D.C. Cir., Feb. 8, 1991), and then to the *en banc* court on rehearing, *En Banc* Brief of Appellee INPO at 10 (D.C. Cir., Nov. 13, 1991), and *En Banc* Reply Brief of Appellee INPO at 6-7 (D.C. Cir., Dec. 30, 1991), that summary judgment for INPO and the NRC was appropriate under Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts showing that there is a genuine issue for trial.*

(emphasis added).

Critical Mass failed to "set forth specific facts" to controvert the evidence supporting the motions by INPO and the NRC, and therefore summary judgment was wholly appropriate even under the legal standard adopted in *Critical Mass I*. As this Court stated in *Celotex*, a party cannot "resist a properly made motion by reference only to its pleadings," 477 U.S. at 325, yet that is effectively what Critical Mass did in the district court here.

Of course, a motion for summary judgment "implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here the NRC bears the burden of proof, but that burden should not be interpreted "so as effectively to preclude any possibility of summary judgment." *Chagnon v. Bell*, 642 F.2d 1248, 1265 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981). *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1125 (D.C. Cir. 1989) (uncontested affidavit from agency employee warranted summary judgment); *Goldberg v. United States Dep't of State*, 818 F.2d 71 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988).

Once INPO and the NRC came forward with their extensive, detailed evidence, Critical Mass could not merely sit on its hands and still win. It was obligated under *Celotex* to controvert the opposing parties' evidence with evidence of its own. This it failed to do. As a result, the judgment of the *en banc* court below, which affirmed the summary judgment entered by the district court, is correct without regard to the question presented in Critical Mass' Petition.

INPO submits that this procedural issue makes this case unsuited for review by this Court. Presumably, this Court, in the event it granted certiorari and then reversed the judgment below, would remand to the D.C. Circuit for further consideration of the Rule 56 issue, which was not addressed by either the panel in *Critical Mass II* or by the court *en banc*. In that event, this Court's decision would not conclude this protracted lawsuit, which might thus limp forward into its second decade.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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No. 92-1043

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and
INSTITUTE OF NUCLEAR POWER OPERATIONS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The Solicitor General acknowledges that "the proper standard for determining whether information is 'confidential' within the meaning of Exemption 4" is surely an issue worthy of this Court's consideration. Fed. Brief in Opp. 9. The Government also does not dispute that none of the seven other Circuits that have already considered the scope of Exemption 4 has adopted the D.C. Circuit's distinction between information submitted voluntarily and information obtained under compulsion — even though at least three of those Circuits have issued major Exemption 4 decisions, in which that distinction might have been dispositive, since it was first proposed by Judge Buckley in his dissent to the first panel decision below,

Pet. App. 62a-64a.[1] The Government further concedes that the decision below is inconsistent with the First Circuit's disposition of *9 to 5 Organization for Women Office Workers v. Board of Governors*, 721 F.2d 1 (1st Cir. 1983).

Nevertheless, the Solicitor General urges this Court to defer consideration of the important issue presented in this case until other Circuits have considered the distinction announced in the decision below. The Solicitor General fails to explain, however, why those Circuits should be forced to reconsider a rule that they have already adopted. If the issue is an important one — and the Government agrees it is — then this case, with a full record and five judicial opinions addressing the scope of Exemption 4 in depth, is the ideal vehicle for addressing it.

The Solicitor General's brief in opposition also reveals that the Department of Justice does not accept the decision below as the last word on Exemption 4. Rather, the Justice Department will continue to argue that *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), should be entirely overruled and replaced with the rule that it urged to the *en banc* Court, *viz.*, that all information not customarily disclosed to the public is "confidential" under Exemption 4, irrespective of the manner in which the Government obtains the information. Thus, the Government maintains that the *en banc* Court's partial reaffirmation of *National Parks* was "technically . . . dicta," Fed. Brief in Opp. 11, even though the very question on which the Court of Appeals ordered rehearing was whether *National Parks* should be reconsidered. *See* Pet. App. 9a. It appears that the Justice Department views the proper scope of

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[1] *See Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1987); *Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936 (10th Cir. 1990).

Exemption 4 as entirely up for grabs, and will argue to the D.C. Circuit, and every other Circuit, that *National Parks* should be entirely overruled.

In other words, the Department of Justice — which is responsible for defending almost every FOIA case and reverse-FOIA case — now believes that the interpretation of Exemption 4 in every Circuit, including the D.C. Circuit, is wrong. If there were ever a situation in which "an important question of federal law . . . has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), this is it.

The Government also ignores at least four other closely related statutes that incorporate the *National Parks* test. *See* Pet. for Cert. 13. In particular, it offers no explanation about how courts are to interpret the identically worded exemptions for business records in the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), and the Federal Advisory Committee Act ("FACA"), *see* 5 U.S.C. App. § 10, both of which operate in close conjunction with the FOIA. The decision of the *en banc* Court will require reconsideration of the governing law for all four statutes, especially FACA, since almost all information submitted to federal advisory committees is submitted voluntarily.

2. The Government believes that the *result* reached by the Court of Appeals in this particular case is correct, but makes no serious effort to argue that the *rule* adopted by the Court of Appeals which must now govern all Exemption 4 cases in the D.C. Circuit, based on the manner in which information is obtained rather than the content of the information, is rooted in the text, legislative history, or purposes of the FOIA. The Government suggests that persons who submit information voluntarily to federal agencies may refuse to do so in the future if the agencies are compelled to disclose that information to the

public. *Id.* at 14.[2] But the Government does not address the principal threat posed by the Court of Appeals' distinction to the fundamental disclosure objectives of the FOIA: A categorical exemption for "voluntarily" submitted information encourages agencies to agree to the "voluntary" submission of secret information even when the agency could and would demand that information, and thereby to hide information from the public that would otherwise be subject to disclosure. We submit that is precisely the situation in this case, where analytical reports about a matter of the highest public importance, the safety of nuclear power plants, have been shielded from the public, even in the absence of a showing that any private or public interest would be harmed by disclosure, and even despite the concession by the Nuclear Regulatory Commission ("NRC") that it could require nuclear plant licensees to provide it with the same reports.

Moreover, the Government does not even attempt to link the Court of Appeals' rule to the core of Exemption 4, the protection of trade secrets and other competitively sensitive business information. It is undisputed that the reports at issue in this case are distributed to utility companies that may be in competition with each other. Every utility company that operates a nuclear power plant in this country is a member of respondent Institute of Nuclear Power Operations ("INPO") and receives the reports at issue in this case. In fashioning a rule that shields information with no relation to any firm's sensitive business secrets, the Court of Appeals strayed far from the interests that Congress intended to protect in Exemption 4.[3]

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[2] Under the *National Parks* test, courts must take that factor into account, although it is not necessarily dispositive. *See* Pet. for Cert. 19.

[3] The Government's attempts to find support in the legislative history of Exemption 4, Fed. Brief in Opp. 10-11, are to little avail.

(continued...)

3. We argued in the petition that the Court of Appeals' rule complicates, rather than simplifies, application of Exemption 4, because it provides no guidance for a wide range of cases where the manner of submission of the information cannot be pigeonholed as "voluntary" or "mandatory," and because it requires reconsideration of many issues in reverse-FOIA cases, previously thought to be definitively settled. Cases decided since the Court of Appeals' decision confirm these points, especially in the crucial area of FOIA requests for, and reverse-FOIA suits over, government contract information. The decision below has made it inevitable that the Government will now face many reverse-FOIA suits to prevent the disclosure of information that agencies could confidently disclose in the past. Even if the decision below has streamlined some aspects of FOIA litigation

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[3](...continued)
As the Government knows, passages in both the 1965 Senate Report and the 1966 House Report referring to information "which would customarily not be released to the public by the person from whom it was obtained" were evidently copied from a prior committee report accompanying an earlier and much broader version of Exemption 4, which was not limited to commercial or financial information, but which protected "other information obtained from the public and *customarily* privileged or confidential." *See* S. 1666, 88th Cong., 2d Sess., *reprinted in* 110 Cong. Rec. 17,087 (1964); S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964). No explanation was given for the deletion of "customarily" between the 1964 and 1965 versions of the FOI bill, nor did any version of the earlier bill contain a definition of "customarily." It is clear, however, that Congress intended the final version of Exemption 4 to be significantly narrower than the earlier version. *See Brockway v. Department of Air Force*, 518 F.2d 1184, 1189 (8th Cir. 1975). Thus, courts addressing the particular passages quoted by the Government have found them to be of limited use in ascertaining the precise scope of Exemption 4. *See National Parks*, 498 F.2d at 769; *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 7 (1st Cir. 1983); *Consumers Union v. Veterans' Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

(which we doubt), it has only shifted the complexity to reverse-FOIA litigation.

This point is well illustrated by the recent decision in *Environmental Technology, Inc. v. EPA*, Civ. Action No. 3:92CV363 (E.D. Va. Jan. 21, 1993), a reverse-FOIA suit, as well as another case discussed at length in the petition.[4] In *Environmental Technology*, the District Court enjoined the Environmental Protection Agency ("EPA") from disclosing information about unit prices charged by a contractor providing environmental cleanup services to the Government. The District Court concluded that the contractor's unit-price information was not required to be disclosed under the FOIA because it had been submitted "voluntarily" to EPA in response to EPA's request for bids, and was therefore exempt from disclosure under Exemption 4, as reinterpreted by the decision below. Slip op. at 5. Because the FOIA did not require EPA to release the information, the District Court reasoned, its disclosure would violate the Trade Secrets Act, 18 U.S.C. § 1905, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

There is no doubt that the *Environmental Technology* case would have been decided in the opposite way under *National Parks*. Indeed, a prior decision of the Fourth Circuit reached the opposite result on virtually identical facts. In *Acumenics Research and Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1988), the court ruled that the Department of Justice would not violate the Trade Secrets Act or the APA by releasing information about unit prices charged by a government contractor providing litigation support services. Applying the *National Parks* test, the Court of Appeals concluded that the information was not exempt from disclosure under Exemption 4. Because the information was subject to

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[4] *See* Pet. for Cert. 16-17, 24-25 (discussing *McDonnell Douglas Corp. v. Rice*, No. 92-2211-JHG (Sept. 30, 1992)).

disclosure under the FOIA, its release was not prohibited by the Trade Secrets Act, which permits disclosures "authorized by law." *See* 843 F.2d at 807-08; *see also Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990) (similar result).

Thus, the decision below conflicts not only with the First Circuit's decision in *9 to 5*, but also with every reverse-FOIA case in which the courts have interpreted *National Parks* to permit the release of information submitted voluntarily to the Government, especially government contract information. *See Acumenics*, *supra*; *Pacific Architects*, *supra*; *see also General Elec. Co. v. NRC*, 750 F.2d 1394 (7th Cir. 1984) (Posner, J.). In all of these cases, disclosure was *permissible* under the Trade Secrets Act only because disclosure was *required* under the FOIA, as construed in *National Parks*. Under the rule announced in the decision below, however, disclosure would probably be neither required nor permissible.

4. The Government criticizes the *National Parks* test as excessively complex, supposedly as illustrated by the Court of Appeals' two decisions to remand this case for further factual development. INPO also argues that the panel's decision to remand this case a second time was inconsistent with Rule 56 of the Federal Rules of Civil Procedure. INPO Br. in Opp. 17-20. Although these arguments are more appropriately addressed to the merits of the case, rather than its suitability for review in this Court, it is noteworthy that the *en banc* Court thought little of these points, and found the Government's citation of a few cases that might have been decided in another or an easier way insufficient to demonstrate the purported "unworkability" of *National Parks*. Pet. App. 12a-13a.[5]

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[5] If anything, the panel was too generous to the respondents in remanding the case a second time. The second panel unanimously stated that it had "searched the present record in vain for any evidence that would justify . . . a finding" that the quality of the INPO

(continued...)

The Government is also mistaken when it states that petitioner believes that only a "bright-line" rule is appropriate for Exemption 4. Fed. Brief in Opp. 17. Petitioner advocates a workable and sensible rule, not an arbitrary one that divides the entire world of information into two mutually exclusive categories. Because the decision below is neither workable nor consistent with the fundamental objectives of the FOIA, the writ of *certiorari* should be granted.

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[5](...continued)
reports could be impaired by disclosure. Pet. App. 84a-85a. In the absence of any evidence to support the NRC's contentions on a central issue in the case, on which the NRC bore the burden of proof, summary judgment should have been entered for petitioner. *See Lujan v. National Wildlife Fed'n*, 496 U.S. 871, 884 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

CONCLUSION

The writ of *certiorari* should be granted.

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